Military Justice, Human Rights and the Law:
An Appraisal of the Right to a Fair Trial in Uganda's Military Justice System

By

Ronald Naluwairo

LLM (Cantab); LLB Hons (Makerere); Dip L.P (LDC); Advocate (Uganda)

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DECLARATION

I hereby declare that this thesis entitled "Military Justice, Human Rights and the Law: An Appraisal of the Right to a Fair Trial in Uganda's Military Justice System" is my work and has not been submitted for any degree or examination in any university or academic institution. All sources and materials used are duly acknowledged and properly referenced.

Ronald Naluwairo

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November 2011

ABSTRACT

Any system or tribunal that exercises judicial power in a democratic society must comply with certain minimum standards for the administration of justice. In international human rights law, these standards are embedded in the right to a fair trial which undoubtedly is the most important prerequisite for ensuring justice in the adjudication of cases. This thesis examines the extent to which Uganda's military justice system complies with the right to a fair trial. It questions the competence, independence and impartiality of Uganda's military tribunals and generally casts strong doubt on the country's current military justice system to administer fair justice according to the minimum international human rights standards. It is argued that despite attempts at reform, Uganda's military justice system is still largely stuck in its historical origins and falls far too short of complying with the country's international human rights obligations concerning the right to a fair trial.

The thesis points out areas that require reform and provides recommendations which can help to make Uganda's military justice system compliant with the country's international human rights obligations concerning the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. Ensuring that the administration of military justice complies with the right to a fair trial is not only an international obligation which Uganda is obliged to fulfill, but could also help it to achieve effective and sustained military discipline – which is the main reason advanced for the existence of military justice as a separate system of administration of justice.

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DEDICATION

This thesis is dedicated to my children viz., Faith Victoria Kirabo Naluwairo, Precious George Naluwairo and Arnold Alvin Naluwairo

LIST OF ACRONYMS

ACODE	Advocates Coalition for Development and Environment
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CAS	Centre for African Studies
CIL	Customary International Law
DMP	Director of Military Prosecutions
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
ECrtHR	European Court of Human Rights
FDC	Forum for Democratic Change
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
IHL	International Humanitarian Law
JLOS	Justice, Law and Order Sector
JSC	Judicial Service Commission
KAR	King's African Rifles
MJSC	Military Judicial Service Committee
NDPP	National Director of Public Prosecutions
NRA	National Resistance Army
NRC	National Resistance Council
NRM	National Resistance Movement
OAU	Organisation of African Unity
OSCE	Organisation for Security and Cooperation in Europe
PMJ	Principal Military Judge
SANDF	South Africa National Defence Forces

SOAS	School of Oriental and African Studies
UDHR	Universal Declaration on Human Rights
UHRC	Uganda Human Rights Commission
ULS	Uganda Law Society
UK	United Kingdom
UN	United Nations
UPDF	Uganda Peoples' Defence Forces

CHAPTER ONE

INTRODUCTION

"Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience."

Louis De Gaya (1678), *The Art of War*.[1]

The importance that Uganda's military justice system plays in the overall administration of justice in Uganda cannot be over-emphasised. Specifically, military tribunals/military courts (terms that will hereafter be used interchangeably) as the major mechanism for the administration of military justice, play a very vital, unique but highly controversial role in the administration of criminal justice with regard to persons subject to the country's military law.[2] Although originally designed to try serving members of the armed forces for the commission of military offences,[3] the jurisdiction of Uganda's military justice system (as is

[1] Quoted in Lindley JM (1990), *A Soldier is also a Citizen: The Controversy over Military Justice, 1917-1920*, Garland Publishing Inc, New York & London, p.37. Quoted also in Fidell ER and Sullivan DH (Eds) (2003), *Evolving Military Justice*, Naval Institute Press, Annapolis, pp.27-28.

[2] Military law is a code which regulates the conduct of members of the armed forces, and which ordinarily is not supposed but in some jurisdictions like Uganda applies to civilians in certain circumstances. The major objective of military law is to ensure discipline and good order in the armed forces. See Dambazau AB (1991), *Military Law Terminologies*, Spectrum Books Limited, Ibadan, p.75. It is always important to distinguish military law from martial law. Martial law generally refers to the exceptional measures adopted whether by the military or the civil authorities in time of war or domestic disturbance for the purpose of preservation of order and maintenance of public authority. Unlike military law whose application is limited (i.e. to mainly members of the armed forces), martial law once established, applies to all persons i.e. soldiers and civilians alike. See O'Sullivan R (1921), *Military Law and the Supremacy of the Civil Courts*, Stevens and Sons Ltd, London, p.47. See also Clode CM (1981), *The Administration of Justice under Military and Martial Law*, University Microfilms International, London, p.157. Martial law normally involves the suspension of ordinary law and derogation from the guaranteed human rights and fundamental freedoms. According to Dicey, martial law "...is nothing more nor less than a name for the common law right of the Crown and its servants to repel force by force in case of invasion, insurrection, riot, or generally of any violent resistance to the law." See Dicey AV (1908), *Introduction to the Study of the Law of the Constitution*, 7th Edition, MacMillan, London, p.284.

[3] Military offences are generally those crimes which are unique to the military in the interest of maintaining discipline and good order, which are subject to military court trials when committed by persons subject to military law. See Dambazau (1991), supra note 2, p.76.

the case with many other countries), has expanded significantly over the years.[4] As the analysis in Chapter Four will show, Uganda's military justice system now has jurisdiction over both military personnel and civilians.

Although in the latter case the jurisdiction is limited, it is worryingly likely to increase. For instance, in June 2010, while delivering his annual State of the Nation Address, President Museveni is reported to have asked Parliament to consider giving jurisdiction to military courts to hear matters involving corruption (whether by military personnel or civilians).[5] Government has also previously indicated the possibility of changing the law to extend the jurisdiction of military courts to hear cases involving persons suspected of involvement in the abominable practice of child sacrifice.[6] The major reason always advanced for the need to expand the jurisdiction of military courts over civilians and over matters that ordinarily fall within the jurisdiction of ordinary courts is that the civil courts take long to dispose of cases. For instance, when he asked the Parliament to extend the jurisdiction of military courts to hear corruption cases, President Museveni is quoted to have remarked that "…there are loopholes in the trial of corrupt officials in the civilian courts as they waste a lot of time seeking evidence."[7] This thesis in Section 1.1 however establishes that, in many cases, Uganda's military courts also take long to dispose of cases. The reason of civilian courts taking long to dispose of cases is therefore not a sound justification for expanding the jurisdiction of military courts.

Uganda's military justice system now also embraces a number of crimes; many of which have no bearing on military discipline and, in ordinary cases, would fall under the jurisdiction of civilian courts. Examples of such crimes include assault, rape, defilement, larceny, burglary and traffic offences. According to the Uganda Peoples' Defence Forces (UPDF) Act 2005 which is the major legal framework governing the administration of military justice in Uganda, a person subject to military law, who does or omits to do an act which constitutes an

[4] As a separate system of administration of justice, a military justice system includes mechanisms for enforcement of military law and decision making processes with regard to the arrest of suspects, investigations, charging, trial, sentencing and imprisonment.

[5] See Osike J and Among B, Corrupt Officials May Face Military Court, *The New Vision*, 2 June 2010.

[6] See Maseruka J, Police Issues Measures to Fight Child Sacrifice, *The New Vision*, 5 January 2009.

[7] Supra note 5.

offence under the Penal Code Act or any other enactment, commits a service offence and is therefore liable to trial by a military court.[8] Unfortunately, despite the role that military justice plays in the overall administration of justice in Uganda, the issue of how the country's military tribunals (as the major mechanism for administering military justice) administer justice remains an area that hardly receives any scholarly attention and inquiry. In particular, there is hardly any study that has comprehensively assessed the conformity of Uganda's military justice system with the right to a fair trial. This is despite the fact that, as this thesis argues, the right to a fair trial is the foundation of any criminal justice system worth its name in any democratic society.

For the important role that the right to a fair trial plays in ensuring justice, securing the protection of other human rights and fundamental freedoms, and safeguarding the rule of law, it is recognized and protected by several regional and international human rights instruments to which Uganda is party. Key among these instruments is the International Covenant on Civil and Political Rights (ICCPR)[9] and the African Charter on Human and Peoples' Rights (herein after referred to as the African Charter).[10] Regarding the former, the United Nations (UN) Human Rights Committee (HRC) – the UN body charged with the interpretation and enforcement of the ICCPR, has emphasised that the right to a fair trial as provided for in Article 14 applies to military tribunals in full just as it does to the civilian and other specialized tribunals.[11] In no uncertain terms, the African Commission on Human and Peoples' Rights (ACHPR) has also forcefully stressed that "...military tribunals must be subject to the same requirements of fairness, openness, and justice, independence and due

[8] See Section 179.

[9] The ICCPR was adopted 16 December 1966 at New York, entered into force on 23 March 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) 52, U.N.Doc. A/6316 (1967). Uganda acceded to the ICCPR on 21 June 1995. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=322&chapter=4&lang=en [Accessed on 1 April 2011].

[10]The African Charter was adopted 27 June 1981 at Nairobi, entered into force on 21 October 1986. Uganda ratified the African Charter on 10 May 1986. See http://www1.umn.edu/humanrts/instree/ratz1afchr.htm [Accessed on 1 April 2011].

[11] See HRC General Comment No.32 (Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial), adopted at the Ninetieth Session of the Human Rights Committee, 23 August, 2007, CCPR/C/GC/32, para.22.

process as any other process."[12] It is thus clear that in the administration of military justice, military tribunals are not an exception when it comes to the requirement to protect and respect the right to a fair trial.

This thesis canvases the major issues concerning the compliance of Uganda's military justice system with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. It questions the competence of Uganda's military tribunals and casts strong doubt on their current set up to administer fair justice according to the minimum international human rights standards embedded in the right to a fair trial. By way of setting the stage for the analysis that follows, the important preliminary questions that must be addressed at this point are: What is military justice? Is military justice, justice at all? What are the justifications for having military justice as a separate system of administration of justice? To what extent are these justifications valid in Uganda's context? Do military personnel waive their human rights including the right to a fair trial by the mere fact of becoming soldiers? Section 1.1 below analytically tries to provide answers to these questions among other issues.

1.1. The Concept of Military Justice

The essence of military justice has been highlighted in a number of scholarly writings[13] and in the case law of numerous jurisdictions. The concept of military justice largely revolves around the justifications for military justice as a separate system of administration of justice[14]

[12] *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria,* African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998), para.44.

[13] See for instance, Gibson MR (2008), "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility While Precluding Impunity," *Journal of International Law and International Relations*, Vol. 4, No.1, pp.1-50, Rowe P (2006), *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, and Fidell and Sullivan (2003), supra note 1. See also Lindley (1990), supra note 1, Bishop JW (1974), *Justice under Fire: A Study of Military Law*, Charterhouse, New York and Sherman EF (1973), "Military Justice Without Military Control," *The Yale Law Journal*, Vol.82, No.7, pp.1398-1425.

[14] According to the UN Commission on Human Rights, military justice is not and should not be considered as a separate system of administration of justice but an integral part of the general justice system. See the UN Draft Principles Governing the Administration of Justice through Military Tribunals (herein after referred to as "the

and the extent to which members of the armed forces are entitled to the respect and protection of their human rights and fundamental freedoms. As opposed to civilian justice, military justice is a system of administration of justice which applies to members of the armed forces and other persons subject to military law. It has the monopoly in dealing with military offences.

As earlier pointed out, military offences are generally those crimes which are unique to the military whose major objective is to enforce discipline and good order in the army.[15] They include such offences as disobedience, desertion, absence without leave, cowardice, mutiny, insubordination and conduct prejudicial to good order and discipline. It is said that some of these offences like insubordination are "...as fatal to armies as gangrene is to human beings."[16] A notable feature about many of these military offences is that they are cast in very broad and vague language which gives the military courts wide discretion when it comes to adjudicating cases involving suspected infraction of military law. Take for example the offence of "conduct prejudicial to good order and discipline."[17] In addition to encompassing all the other specific military offences, it can include many other undefined things which in the opinion of the military tribunal are prejudicial to good order and discipline. Although Section 178 (5) of the UPDF Act provides some of the instances that amount to conduct prejudicial to good order and discipline of the Defence Forces, Section 178 (6) states in no unclear terms that "Nothing in subsection (5) shall affect the general effect of subsections (1) and (2)." It is submitted that the very broad and vague language in which many military offences are cast makes the administration of military justice susceptible to abuse and manipulation. The noncompliance of a military justice system with the right to a fair trial makes the problem even worse.

Historically, as Sherman correctly observes, military justice developed as a separate legal system under command control because military units were often isolated from both civilians

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UN Principles on Military Justice"), U.N. Doc. E/CN.4/2006/58 (2006), paras.3, 10 and 11. See also UN Commission on Human Rights Resolutions 2004/32 and 2005/30.

[15] Supra note 2.

[16] See Lindley (1990), supra note 1.

[17] Section 178 (1) of the UPDF Act, 2005 provides that "Any act, conduct, disorder or neglect to the prejudice of good order and discipline of the Defence Forces shall be an offence."

and each other.[18] Commanders therefore needed the power to convene military courts staffed with their own officers so that a quick determination of guilt or innocence could be made.[19] However, despite the fact that modern transport and communication have ended the isolation of military units and that the trial of service men in civilian courts is feasible in most situations, military justice still remains as a separate system of administration of justice in many countries.[20]Advocates for military justice as a separate system of administration of justice advance a number of theoretical arguments in support of their viewpoint.[21]

First, it is often argued that the military is a unique society apart from civilian life which requires different legal standards that the civilian courts cannot appreciate or adequately enforce. In *Parker v. Levy*,[22] delivering the judgment of the Supreme Court of the United States of America, Justice Rehnquist emphasised the specialised nature of the military society as thus:

> The Court has long recognized that the military is by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed traditions of its own during its long history… In *re Grimley* the Court observed: "An Army is not a deliberative body. It is the executive arm. Its law is that of obedience…" More recently, we noted that "the military constitutes a specialized community governed by a separate discipline from that of civilians…" Just as military society has been a society apart from

[18] Sherman (1973), supra note 13, p.1400.

[19]Ibid. For most part, military tribunals were not regarded as courts at all, but rather as instrumentalities of the executive power provided to aid Presidents as Commanders-in-Chief, through their authorized military representatives, in properly commanding the armed forces and enforcing military discipline. See Kent SB (1976), "Structures of American Military Justice," *University of Pennsylvania Law Review*, Vol.125, No.2, p.314.

[20] Sherman (1973), supra note 13, p.1400.

[21] It is worth pointing out from the onset that most of these theoretical arguments look at military justice in the context of members of the armed forces only. However, in today's world, a number of military justice systems including Uganda's military justice system have jurisdiction over civilians as well. The HRC has correctly observed that trial of civilians by military tribunals raises serious problems as regards the equitable, impartial and independent administration of justice. See HRC General Comment No.32 (2007), supra note 11. For a recent appraisal of the HRC's jurisprudence on the issue of trial of civilians by military courts, see Shah S (2008), "The Human Rights Committee and Military Trials of Civilians: *Madani v. Algeria*," *Human Rights Law Review*, Vol.8, No.1, pp.139-150. The issue of jurisdiction of military tribunals over civilians is analysed in detail in Chapter Two, Section 2.3.1.

[22] *Parker v. Levy*, 417 U.S. 733(1974).

> civilian society, so "military law… is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[23]

Senator Nunn summarised the reasons why the military is considered as a unique specialised community which requires different rules and standards in the following words:

> The primary mission of the armed forces is to defend our interest by preparing for and, when necessary, waging war, using coercive and lethal force. Responsibility for the awesome machinery of war requires a degree of training, discipline and unit cohesion that has no parallel in civilian society. The armed forces must develop traits of character, patterns of behaviour, and standards of performance during peace time in order to ensure effective application and control of force in combat. Members of the armed forces are subject to disciplinary rules and military orders twenty-four hours a day, regardless of whether they are actually performing a military duty. Military service is a unique calling. It is more than a job. Our nation asks the men and women of the armed forces to make extra ordinary sacrifices to provide for the common defence. While civilians remain secure in their homes, with broad freedom to live where and with whom they choose, members of the armed force may be assigned, involuntarily, to any place in the world, often on short notice, often to places of grave danger, often in the most spartan and primitive conditions…Once military status is acquired, military service loses its voluntary character. Once an individual has changed his or her status from civilian to military, that person's duties, assignments, living conditions, privacy and grooming standards are all governed by military necessity, not personal choice.[24]

While it is accepted that, indeed as elaborated by Senator Nunn, the military is a unique society, it is submitted that there is nothing in that uniqueness which warrants the denial or violation of the military personnel's internationally guaranteed right to a fair trial. Indeed because of the extra ordinary sacrifice that they make for the common good, members of the armed forces deserve to be treated in a just and fair manner in the process of administration of military justice. This can only be by guaranteeing their internationally protected right to a fair trial.

In support of the view that the military is a unique society which requires different rules and standards, it is also frequently argued that military offences such as absence without leave, desertion, insubordination, cowardice, mutiny and the like have no civilian analogues: the adjudication of guilt or innocence and the assessment of appropriate punishment may require

[23]Ibid, pp.743-744. See also Westmoreland WC (1971), "Military Justice – A Commander's View Point," *The American Criminal Law Review*, Vol.10, pp.5&7.

[24] See Nunn S (2003), "The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases," in Fidell and Sullivan (2003), supra note 1, pp.4-5.

experience and knowledge not commonly possessed by civilian judges and jurors.[25] Delivering the judgement of the Supreme Court of the United States of America in *United States ex rel. Toth v. Quarles*,[26] Mr. Justice Black agreed thus: "It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offence charged against a soldier is purely military, such as disobedience of an order, leaving post, etc."[27]

To the extent that this argument extends only to trying members of the armed forces for offences of a military character, it may be valid. But in countries like Uganda where military tribunals also have jurisdiction over non-military (civilian) offences, the above justification becomes highly contentious. As the analysis in Chapter Four will establish, Uganda's military tribunals lack the necessary capacity and competence to deal with the legal intricacies and evidential technicalities that most civilian offences present.[28] But even with military offences, it is still doubtable in Uganda's context that applying the same principles and standards of criminal justice, as should be the case, military personnel would be more competent than civilian judges in trying such cases. As Chapter Four will establish, Uganda's military justice legal framework does not guarantee the legal competence of Uganda's military tribunals and the short tenure of the members of these courts and the judge advocates does not allow gaining relevant experience. This is unlike the situation with civilian courts, where judges are legally qualified and, over time, develop the skills and experience to deal with peculiar cases in such highly specialised areas as surgery, human medicine, architecture and engineering. Applying the same principles and standards of administration of criminal justice, and with the help of experts where need be, it is submitted that in Uganda's context, civilian courts would be more competent and better placed to deal with infractions of military law than the military tribunals.

[25] Bishop (1974), supra note 13, p.24. See also Rowe (2006), supra note 13, p.79.

[26] *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

[27] Ibid, p.18.

[28] It is noteworthy observing that, at least going by media reports, Uganda's military tribunals are increasingly handling more civilian than military offences. See for instance Amoru P, Army Jails three over poaching in Murchison Falls, *Sunday Monitor*, 17 May 2009, Edyegu D, Court Martial Orders Omeda to Refund Sh2.3 Million, *The New Vision*, 17 November 2008 and Bagala A, Kampala's Top Criminals, *The Daily Monitor*, 23 May 2008. See also Jaramogi P, Two Held over Mityana Road Robbery, *The New Vision*, 9 March 2009.

It is also usually posited that military justice as a separate system of administration of justice is necessary because of the need for speedy trials to avert the erosion of discipline and the consequential negative effects on the operational effectiveness of the army.[29] It is often argued in this respect that the machinery by which ordinary courts of law ascertain the guilt or innocence of an accused citizen is too slow and too intricate to be applied to an accused soldier. Lord Macaulay thus argued that "…for, of all the maladies incident to the body politic, military insubordination is that which requires *the most prompt* and drastic measures…For the general safety, therefore, *a summary jurisdiction* of terrible extent must, in camps, be entrusted to rude tribunals composed of men of the sword."[30] In the words of Mr. Justice Black, military justice must of necessity be "...a rough form of justice, emphasizing *summary procedures, speedy convictions* and stern penalties..."[31] The Constitutional Court of South Africa has also stressed the need for a speedy disposal of cases as justification for the separation of the military justice system, emphasising that, "The conditions in which the South Africa National Defence Forces (SANDF) must operate in times of war- and in which therefore must be trained in peace time - are such that quick and efficient investigation of infractions must be possible, as well as prompt decisions on institutions of prosecutions…"[32]

To the extent that military justice emphasises the need for quick investigations of infractions of the law and speedy trials, this is commendable. It is indeed in the interest of justice that suspects should be tried within the shortest time possible. For as it is often said, "justice delayed is justice denied." Thus, as part of the right to a fair trial, international human rights law guarantees and protects the right to be tried without undue delay.[33] But how swift must

[29] Gibson (2008), supra note 13, p.16. See also Bishop, supra note 13, p.21. But military justice scholars like Rowe acknowledge that military courts may also succumb to delay. Rowe argues that there may be various reasons for such delay including the fact that the process for convening of courts-martial may not move quickly. See Rowe (2006), supra note 13, p.86.

[30] Macaulay TB (1856), *History of England*, Longman, London, p.35. Emphasis added. See also Bishop (1974), supra note 13, p.21.

[31] *Reid v. Covert*, 395, U.S. 1, 35-36 (1957). Emphasis added. See also Bishop (1974), supra note 13, p.22.

[32] *Potsane v. Minister of Defence*, Constitutional Court of South Africa 2002 (1) SAI CC (2001).

[33] See Article 14 (3) c of the ICCPR and Article 7 (b) of the African Charter. The HRC has stated that the right to be tried without undue delay relates not only to the time by which a trial should commence, but also the time

investigations be carried out and trials conducted in order not to compromise the very essence of justice? The general principle is that this depends on the circumstances of a particular case.[34] There are however increasingly a number of instances in Uganda where even if taking the circumstances into account, the speed with which military courts dispose off cases raises serious questions about the administration of military justice. Perhaps the most shocking in recent times was the summary trial and public execution of Corporal Omedio and Private Abdbullah Muhamad. The two soldiers were publicly executed on March 25th 2002 after a trial of less than three hours before a Field Court Martial whose competence, independence and impartiality was highly doubtable.[35] The court-martial found them guilty of triple murder. The investigation, trial and execution took place less than 72 hours after the alleged crime was committed.[36] As Onoria rightly argues, within such a very short time, it is highly doubtful that this was sufficient time to conduct a thorough investigation and trial where evidence against the accused soldiers needed to be gathered and weighed, as well as to enable the soldiers to prepare and present their defence.[37] The accused persons had no legal representation and it is highly unlikely that they were even informed of their right to counsel and other fundamental human and constitutional rights in criminal processes. Moreover the fact that they were immediately executed means that the accused where never given opportunity to exercise their right of appeal.

In Uganda's case, the justification for military justice as a separate system of justice on the basis of the need for speedy trials is also contestable because there are increasingly, a number of cases taking too long to investigate and dispose off than is reasonably necessary. One case will suffice to illustrate this point. In *Attorney General v. Joseph Tumushabe,*[38] the accused

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by which it should end and judgment be rendered. It has emphasised that all stages, whether in the first instance or on appeal must take place without undue delay. See HRC General Comment 32 (2007), supra note 11, para.35.

[34] HRC General Comment 32 (2007), ibid.

[35] The UPDF Army Commander at the time, Major General James Kazini is said to have questioned the length of time, arguing that it should not even have lasted two minutes. See Aliro K, 1000 Ghosts Found in UPDF: Kazini names Priest's Killers, *The Daily Monitor*, 22 May 2002.

[36] Tegulle G, What is a Field Court Martial? *The New Vision*, 3 April 2002.

[37] For a thorough analysis of the legal and constitutional issues surrounding this case, see Onoria H (2003), "Soldiering and Constitutional Rights in Uganda: The Kotido Military Executions," *East African Journal of Peace & Human Rights*, Vol.9, No.1, pp. 87-114.

[38] Constitutional Appeal, No.3 of 2005.

persons were arrested and detained in March 2003. They were never charged with any offence until 16th April 2003 when they were charged in the General Court Martial with the offence of treason contrary to Section 25 of the Penal Code. This was only after an order of *Habeas Corpus* was issued by the High Court on 11th April 2003, returnable on 17th April 2003. On 6th November 2003, in an application seeking redress for violation of the detainees' fundamental human rights and freedoms, Justice Ntabgoba P.J, ordered that the detainees be allowed contact with their lawyers, relatives and friends. On 30th April 2004, over 400 days after the detainees were charged before the General Court Martial and remanded in custody, their advocates wrote to the Chairman of the General Court Martial forwarding the detainees' bail application and requesting for an urgent hearing of the application in May. However, it was not until 2nd July 2004 that the application was heard. On 22nd July 2004, the General Court Martial delivered its ruling in which it dismissed the application, observing, inter alia, that bail is discretionary and not mandatory. The detainees appealed against this ruling to the Constitutional Court and finally the Supreme Court which rendered its decision on 9 July, 2008 nullifying the ruling of the General Court Martial. The Supreme Court held that since the detainees were in custody for more than 120 days awaiting trial, under Article 23 (6) b of the Constitution,[39] it was mandatory to release them on bail, irrespective of the provisions of the UPDF Act concerning bail.

Other factors remaining constant, if a person is arrested and detained in March 2003 but by July 2004, investigations into their case are still ongoing and their trial is not about to start, does that amount to a speedy disposal of the case so as to justify military justice as a fast system of administration of justice? Would there be any justice done to the detained persons who have to wait this long? Clearly the answer to these questions is No. As earlier pointed out, the right to be tried without undue delay relates not only to the time by which a trial should commence, but also the time by which it should end and judgment rendered. Recent statistics from Uganda's General Court Martial also indicate that military justice is not efficient in terms of speedy handling of cases. Between 1992 and 2009, a total of 554 cases were registered in the General Court Martial, out of which 391 cases were disposed of,

[39] This Article provides that where a person is arrested in respect of a criminal offence triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in respect of the offence before trial for one hundred and twenty days.

leaving a backlog of 163 cases.[40] This means that nearly 30% of the cases registered remained outstanding. Moreover as shown in the case of *Attorney General v. Joseph Tumushabe* above, some of these cases stretch to as far back as 2003. For a system whose existence is largely justified on the need to ensure speedy trials, these figures are disappointing. It is instructive to note that the backlog is largely attributed to delayed court sittings.[41] In its ninth annual report for instance, the Uganda Human Rights Commission (UHRC) noted with concern, after visiting some military detention centres, that, some inmates had languished there for over three years without either being taken to court or their cases disposed of.[42] The inmates complained to officials of the Commission that the General Court Martial and the Division Court Martial in which they were supposed to be tried, rarely convened, and when they do, they simply adjourn hearings.[43] So, from this perspective, the need to ensure speedy trials as justification for having military justice as a separate system of administration of justice remains questionable in Uganda's context.

Related to the need to ensure speedy trials, advocates of military justice as a separate system of justice further argue that military justice is premised on the need to have "portable and flexible tribunals" to deal with infractions of military law wherever they arise. This is especially because by the nature of their main function (i.e. to defend national sovereignty and territorial integrity), armed forces of one country may find themselves in another country, where the jurisdiction of the ordinary courts of their country may not reach or may not be applicable. It is therefore argued that military tribunals unlike ordinary courts must be portable and capable of holding trials where the crimes are committed.[44] While this may be a valid justification, it is important to note that there are also a number of instances where ordinary courts are given extra-territorial jurisdiction. In Uganda's case for instance, civilian courts have extra-territorial jurisdiction over crimes such as treason, concealment of treason,

[40] See Wandera A, Koreta Leaves Court-Martial, *The Monitor*, 3 August 2009.

[41] Ibid.

[42] UHRC (2006), *Uganda Human Rights Commission 9th Annual Report*, Uganda Human Rights Commission, Kampala, p.33.

[43] Ibid.

[44] See Gibson (2008), supra note 13, pp.16-17 and Bishop (1974), supra note 13, p.24.

ridiculing the person of the President and terrorism.[45] It is just that the ends of justice are better served to hold trials in areas where the alleged crimes are committed.

Another major reason always advanced as justification for military justice as a separate system is that the civilian criminal process is riddled with a lot of uncertainties. "In civilian jurisprudence, the number of guilty men who are not punished is far, far greater than the number of innocent men who are, and few of us would have it otherwise," so argues Bishop.[46] "But the doctrine that it is better that ninety-nine (or nine hundred and ninety-nine) guilty men go free than one innocent be convicted is not easily squared with the need to maintain efficiency, obedience and order in an army, which is an aggregation of men (mostly in the most criminally prone age brackets) who have strong appetites, strong passions, and ready access to deadly weapons," he adds.[47]

Bishop's argument raises fundamental questions that seem to challenge the very foundation of the notion of criminal justice, not to mention the right to a fair trial and due process. Implicit in his argument, Bishop challenges the application of the right to presumption of innocence and intimates that it is incompatible with the needs of the military. Although he argues further that "...the demands of the military justify a procedure that does lessen the chance of unjust acquittal, while it need not, and should not, increase the possibility of unjust conviction...,"[48] the language he uses removes any doubt that the "certainty" he means which is vital in military justice is certainty of convictions and not acquittals. He speaks of "the number of guilty men who are not punished" meaning not "convicted," suggesting that he doesn't believe in the internationally protected right to presumption of innocence, which arguably is one of the most fundamental principles of criminal justice in any democratic society. If in this respect military justice is incompatible with the presumption of innocence and therefore the right to a fair trial, then surely "military justice" is a misnomer which must be corrected.49 It is incontestable that in any democratic society, it is mainly the fair trial

[45] See Section 4 of the Penal Code Act, Chapter 120, Laws of Uganda, 2000.

[46]Bishop (1974), supra note 13, p.23.

[47] Ibid.

[48] Ibid.

[49] In *Reid v Covert*, supra note 31, Mr. Justice Black rightly pointed out that military law emphasizes the iron hand of discipline than the even scales of justice.

guarantees embedded in the right to a fair trial (including the presumption of innocence) which ensure that justice is not only done but is also manifestly seen to be done. It is therefore submitted that without guaranteeing the right to a fair trial in the adjudication of cases, there cannot be justice.

Perhaps the most compelling justification (which also underlies all those analysed above) is that military justice as a separate system of administration of justice is necessary for the enforcement of military discipline, which is said to be paramount in ensuring military efficiency.[50] Emphasising this point, Lord Bingham of Cornhill – former Lord Chief Justice of England and Wales stated thus:

> It is a truism, but an important truism, that the quality of any fighting force depends, among other things, on its discipline; and effective discipline must be underpinned by a code which defines the rights and obligations of those who serve, providing sanctions for proven misconduct. Some forms of misconduct such as the most serious criminal offences, affect civilians and service personnel alike; others such as conduct prejudicial to service discipline, have no civilian equivalent; others still, such as theft or possession of drugs, have a more serious character in a barrack-room or on a mess-deck than in any ordinary civilian context. And the services have their own rules and procedures for investigating offences, arresting and charging suspects, establishing courts, conducting trials, reaching and confirming decisions.[51]

[50] In the old case of *Heddon v. Evans* (1919) 35 TLR 642, McCardie J put it as follows: " I agree that discipline is the soul of the army. It is the basis of all military efficiency. National safety depends upon the armed forces of the people. The power of those forces rests on maintenance of discipline. The plainest instincts of patriotism call for its enforcement on one hand, and a ready submission to its requirements on the other." In military science, discipline means a state of mind in the individual serviceman, so that he will instantly obey orders no matter how unpleasant or dangerous the task may be. See Byrne EM (1981), *Military Law*, Naval Institute Press, Annapolis, p.1. See also Dambazau (1991), supra note 2, p.39. A subordinate officer must not judge of the dangers, propriety, expediency, or consequences of the order he receives; he must obey – nothing can excuse him but a physical impossibility. See Clode (1981), supra note 2, p.15. The development of this state of mind (i.e. to instantly obey orders without question regardless of the risk involved) among members of the armed forces is said to be a command, responsibility and a necessity. See Dambazau (1991), supra note 2, p.39. The duty to obey orders from superior authority regardless of the risk involved, is "...the first, second and third duty of a soldier at all times." See Clode (1981), ibid.

[51] See the Foreword to Rant JW (1998), *Courts-Martial Handbook, Practice and Procedure*, Johnwiley and Sons Ltd, London. This Foreword is reproduced in the second edition of this book viz., Rant JW (2003), *Courts-Martial, Discipline, and the Criminal Process in the Armed Services*, Oxford University Press, New York, p.5.

In the celebrated Canada Supreme Court case of *R v. Genereux*,[52] former Chief Justice of Canada, Justice Lamer, tersely put it as follows:

> The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the armed forces in a state of readiness, the military must be in position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own code of service discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts have been given the jurisdiction to punish breaches of the code of service discipline. Recourse to ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[53]

Wigmore made the point even clearer when he argued that, "Military justice knows what it wants…i.e...discipline…and it systematically goes in and gets it."[54] He emphasised that "…military Justice wants discipline – that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of men."[55] He pointed out that the court-martial supplies the sanction of this discipline and that "it takes on the features of justice because it must naturally perform the process of inquiring, in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline."[56] In fact, from the perspective of military authorities, it is ironically said that military tribunals are nothing more than discipline training schools for members of the armed forces. Quoting one commentator on military justice, Kent wrote thus:

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[52] *R v. Genereux* [1992] 1 S.C.R 259.

[53] Ibid, p.293. In *Parker v. Levy*, supra note 22, p.744, citing *Burns v. Wilson*, 346 U.S. 137,140 (1953), and emphasising that the military is by necessity, a specialised society governed by a separate discipline from that of civilians, Justice Rehnquist speaking for a five man majority of the Supreme Court of the United States of America emphasised that, "... rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."

[54] See Wigmore J (1921), "Lessons from Military Justice," *Journal of the American Judicature Society*, Vol. 4, p.151.

[55] Ibid.

[56] Ibid.

> ...a court-martial is merely an agency appointed by the commanding officer for the training of soldiers in discipline, and though one is sentenced by such a tribunal to death or to a long term of imprisonment, he is not deprived of life or liberty or in fact punished at all, but merely trained and educated and disciplined. A criminal sentence in the army, in short, serves the same purpose as the manual of arms or the setting up exercises, and must be cheerfully acquiesced in, no matter how severe it may be, as it is but a part of the school of the soldier.[57]

It is because of this supposed vital role in enforcing military discipline, that scholars like Gibson and Rowe argue that it is critical that military tribunals must be staffed with persons who not only possess an understanding of the necessity for, and role of discipline in an armed force, but also who understand the specific requirements of discipline.[58] The important question for this thesis is: How does military justice ensure and enforce discipline? If it does so in ways inimical to the accused persons' guaranteed fundamental human rights in the administration of criminal justice, in particular the right to a fair trial, then surely military justice is not justice at all. In the international human rights discourse, it is undoubtedly the right to a fair trial which provides the minimum safeguards for ensuring justice in criminal processes in any democratic society.

From the above analysis, it is clear that the principal rationale for military justice as a separate system of administration of justice is the enforcement of military discipline and good order in the armed forces. This being so, the following questions may be asked: Is it only military tribunals, through their penal sanctions, which can ensure discipline? Isn't it a possibility that civilian courts can achieve even better military discipline for military efficiency? Why do military tribunals then have jurisdiction to try civilians or even soldiers for crimes unrelated to military discipline?[59] Regarding the first question, Sharman correctly observes that the changes in armed forces dispute the necessity and desirability of using

[57] See Kent (1976), supra note 19, p.318.

[58] See Gibson (2008), supra note 13, p.14 and Rowe (2006), supra note 13, p.79 respectively.

[59] It is often argued that a general criminal offence committed by a soldier is no less a breach of military discipline than a purely military offence. But unless such general criminal offences are committed in a military context as Rowe (supra note 13, pp.10 and 80) and Gibson (supra, note 13, p.37) qualify it, such over generalization is questionable. It is for instance not plausible to argue that while on leave, a soldier's act in assaulting his wife (which constitutes a criminal offence in Uganda) is adverse to military discipline, so that such a soldier should be tried by a military court.

military courts primarily as a vehicle for enforcing military discipline.[60] The military leadership doctrine now favors persuasion over authoritarian domination and views the commander's objective as instilling high initiative and morale rather than rigid discipline.[61] There are also a number of effective ways through which military discipline can be enforced without necessarily invoking military justice through the media of military tribunals.[62] With respect to the last question, disputing that jurisdiction of military tribunals to try retired service men who had turned civilians was important for enforcing military discipline and good order in the armed forces, Mr. Justice Black rightly argued that "It is impossible to think that discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefits of a civilian court when they are actually civilians."[63] He emphasised that free countries "…*restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service*."[64]

The obsession of military justice with the enforcement of military discipline raises the question whether members of the armed forces and other persons subject to military law are entitled to enjoy the respect and protection of their human rights especially those related to a fair trial and due process. In the old case of *Burdett v. Abbot*, Sir James Mansfield C.J. emphasized the correct position when he stated that, "It is, therefore highly important that the mistake should be corrected which supposes that an English man by taking upon him the additional character of a soldier puts off any of the rights…of an Englishman."[65] He emphasised that "…a soldier is gifted with all the rights of other citizens, and is bound to all the other duties of other citizens."[66] This therefore means that persons who join the military

[60] Sharman (1973), supra note 13, p.1402.

[61] Ibid.

[62] Ibid.

[63] *United States ex rel. Toth v. Quarles,* supra note 26, p.22.

[64] Ibid. Emphasis added.

[65] *Burdett v. Abbot* (1812), 4 Taunton, 401 at 449.

[66] Ibid. In the old Australian case of *Linday v. Lowell* (1917) VLR 734 at 764, Mr. Justice Hood also clarified that a man by becoming a soldier does not cease to be a citizen but just changes his status as he does on marriage. In Warren E (1962), "The Bill of Rights and the Military," *New York University Law Review*, Vol. 37, p.188, Justice Warren, former Chief Justice of the United States also wrote that "...our citizens in uniform may not be stripped of their basic rights simply because they have doffed their civilian clothes." These consistent

retain their fundamental rights (including the right to a fair trial), and are entitled to their respect and protection. Rowe argues however, that the rights of members of the armed forces must be considered in a military context.[67] While this may be the correct position in international human rights law, it is submitted that whatever interpreting rights of members of the armed forces in a military context means, if in essence the end result is to deny soldiers the enjoyment of their guaranteed fundamental rights, any such interpretation would amount to violation of international human rights law.

It is further argued that the obligations of a soldier under military law is based on the doctrine of compact; meaning that a person who enlists in the army, thereby consents to be bound, as in contract by military law and discipline.[68] It has thus been held, that a man by becoming a soldier and receiving the Queen's pay does agree and consents that he shall be subject to the military discipline, and that he cannot appeal to the civil courts to rescue him from his compact.[69] The question to be posed at this point is: how valid is this compact doctrine? How far true, is it, to say that by enlisting in the army, one consents to be bound by all its rules and regulations including military discipline, and by implication sacrifice one's right to a fair trial?

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arguments by judges and scholars inter alia are what resulted in the doctrine of "the soldier as a citizen." For a recent reassessment of this doctrine, see Rowe P (2007), "The Soldier as a Citizen in Uniform: A Reappraisal," *New Zealand Armed Forces Law Review*, Vol. 7, pp.1-17.

[67] Rowe (2006), supra note 13, pp.10 and 80. In *Akbulut v Turkey*, Application No. 45624/99, Admissibility decision of 6 February 2003, referring to the ECHR, the ECrtHR also concluded that "...it is well established that the Convention applies in principle to members of the armed forces and not only to civilians. However, when interpreting and applying the rules of the Convention in cases such as the present one, *the Court must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.*" Emphasis added.

[68] The doctrine of compact was invented by Mr. Justice Willes in *Dawkins v. Lord Rokeby* (1866) 4 F. & F. 806 where at p.806 he stated thus: "But with respect to persons who enter into the military state, who take His Majesty's pay, and who are content to act under his commission, although they do not cease to be citizens in respect of responsibility, yet they do by a compact which is intelligible and which requires only the statement of it to recommend it to the consideration of any one of common sense, become subject to military rule and discipline."

[69] *Grant v. Gould* (1792), 2 Henry Blackstone Rep 69. See also Clode (1981), supra note 2, p.19.

First, it is important to note that not all persons who enlist in the army do so voluntarily, so as to infer that they consent to be bound by military law and discipline. Some are just conscripted. In fact in Uganda's case, while majority of the recruits in the army join voluntarily, the country's Constitution still leaves open the option of conscription.[70] Second, although on the face of it, it may appear that majority of persons who enlist in the army do so voluntarily, this is not always the case in the actual meaning of the word "voluntary." Many, especially in the developing world, are just forced by the very hard economic circumstances in which they find themselves. They enlist in the army as a last resort. But even for those who enlist voluntarily within the real meaning of the word, as Rowe correctly argues, "[i]t is difficult to conclude that, by the mere fact of joining the armed forces voluntarily, they have consented to all the treatment to which they are subjected in the armed forces, or that they have waived or accepted limitations to be placed on those human rights available to them as civilians."[71] Often times, people join the forces without knowing the true character of military service including the rules governing military justice. In most cases, on enlistment, they are never given the precise details of their job description and the conditions under which they will operate. As Rowe rightly points out, they are never in the same position as a person who wishes to know the terms of a particular civilian employment before he commits himself to it.[72]

But even if we accept that enlisting in the army voluntarily or otherwise means that a person has agreed to be subjected to its rules and regulations including military justice, as Justice McCardie puts it that, "the compact or burden of a man, who enters the army, whether voluntarily or not, is that he will submit to military law and not that he will submit to military illegality…,"[73] it still means that military illegality for instance in form of denial or violation of the fundamental human rights of members of the armed forces is contrary to the law. In a

[70] Article 25 of the Constitution which bars forced labour provides that forced labour does not include any labour required during any period when Uganda is at war. It is not in doubt that the major form of labour envisaged under this provision is conscription in the army when necessary in war time.

[71] Rowe (2006), supra note 13, p.10. This is not to say that a soldier cannot waive on specific occasions certain rights that he/she may be entitled to. But as was emphasised in *Ocalan v. Turkey* (2003) 37 EHRR 10, para.116, any such waiver must be established in an unequivocal manner.

[72] Ibid.

[73] *Heddon v. Evans*, supra note 50, p.643. This case is fully reproduced and discussed in O'Sullivan (1921), supra note 2, pp.42-119.

series of cases, as Rowe rightly observes, the ECrtHR has emphasized the principle that a soldier does not waive his rights given by a human rights instrument, merely by voluntarily joining the armed forces.[74] In the United States of America, the Supreme Court has previously held that whatever may be contained in military law and military court procedure cannot override a soldier's constitutional rights.[75] Similarly, in his concurring judgment in the United States Supreme Court case of *Weiss v. United States*,[76] Justice Ginsburg correctly argued that the men and women constituting the armed forces must be treated as honored members of society whose rights do not turn on the charity of military commanders. He emphasised that "a member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution."

Clearly therefore, in the enforcement of military discipline, military tribunals just like their civilian counterparts, are obliged to respect, protect and uphold the accused persons' fundamental human rights, in particular the right to a fair trial. A fair and just military justice system which guarantees, respects and upholds the accused persons' guaranteed rights in the criminal process embedded in the right to a fair trial could in fact help achieve better and sustained discipline and morale in the armed forces. Justice is an essential prerequisite for discipline.[77] The two are in fact said to be inseparable. As correctly stated in the 1960 Powel report, "In the development of discipline, correction of individuals is indispensable; in

[74] See for instance *Smith and Grady v. United Kingdom* (2000) 29 EHRR 493 and *Perkins v. United Kingdom* (22 October 2002). These cases involved dismissals of the applicants from the army for violations of the United Kingdom Ministry of Defence absolute policy against presence of homosexuals in the armed forces. The ECrtHR did not however hold that since the respective members of the armed forces had willingly accepted a system of military discipline incompatible with their sexual orientation, Article 8 of the ECHR which guarantees the right to privacy was inapplicable to their cases. On the contrary, the Court found a violation of Article 8 of the ECHR, arguing that the direct interferences with the applicants' right to respect for their private lives could not be justified as being necessary in a democratic society as per Article 8 (2) of the ECHR. In *Kalac v. Turkey* (1999) 27 EHRR 552, para.28, the ECrtHR however stressed the point that in choosing to pursue a military career, a member of the armed forces accepts a system of military discipline which by nature implies the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians.

[75] *Burns v. Wilson*, supra note 53, p.142.

[76] *Weiss v. United States*, 510 U.S. 163 (1994).

[77] Lederer F and Zellif B (2003), "Needed: An Independent Military Judiciary. A Proposal to Amend the Uniform Code of Military Justice," in Fidell and Sullivan (2003), supra note 1, p.38.

correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice – the two are inseparable."[78] Similarly, in his study of Canadian military law, Fay also argued that:

> Fairness and justice are indispensable… When the serviceman has confidence in his commanders and believes in the organisation, there is discipline… It is from military law that the serviceman receives his most tangible indication of the relationship between himself and those who command. It is under military law that he is tried and punished. If the military law system is a just system, then it will be recognized as such by the serviceman and thus it will promote and support the discipline upon which the military organisation is based.[79]

If the means of ensuring and enforcing discipline are perceived as unfair, as Lederer and Zellif rightly put it, members of the armed forces will likely distrust superior authority and their institutional loyalty will be diminished.[80] This will not help in any way to instill discipline and morale in the army. It will instead erode it. It is therefore important that in the enforcement of military discipline, military tribunals and other establishments for the administration of military justice protect, uphold and respect those rights considered vital for ensuring justice. These are the rights embedded in the right to a fair trial. It is in the above context therefore that this thesis sets out to examine the compliance of Uganda's military justice system with the right to a fair trial.

1.2. Statement of the Problem

The right to a fair trial is the cornerstone of any criminal justice system in a democratic society; without which, justice remains a mockery. It is the critical element in the protection and realisation of all the other internationally protected and guaranteed human rights and freedoms.[81] Without its protection, human rights remain a mere statement of legal rhetoric. It is a basic civil right critical for safeguarding the rule of law in any democratic state.[82] It is

[78] U.S. Department of Defense, Report to Honorable Wilber M. Brucker, Secretary of the Army by Committee on the Uniform Code of Military Justice, Good Order, and Discipline in the Army (Powel Report) (OCLC 31702839) (18 January 1960), p.11. Quoted also in Gibson (2008), supra note 13, pp.14-15.

[79] Fay JB (1975), "Canadian Military Criminal Law: An examination of Military Justice," *Chitty's Law Journal*, Vol.23, No.4, p.123. See also Walker J (1994), "Military Justice: From Oxymoron to Aspiration," *Osgoode Hall Law Journal*, Vol. 32, No.1, p.25.

[80] Lederer F and Zellif B (2003), supra note 77, p.37.

[81] HRC General Comment No.32 (2007), supra note 11, para.2.

[82] Ibid.

indispensable in the protection of the individual against abuse of the criminal justice process by the state and its agents.[83] The right to a fair trial is protected and affirmed by key international and regional human rights instruments to which Uganda is party. Key among these is the ICCPR and the African Charter.[84] As a state party to these instruments, Uganda is obliged in accordance with the doctrine of *pacta sant servanda*[85] to fulfil its obligations in good faith.

Importantly, the HRC has emphatically made it clear that the right to a fair trial as provided for in Article 14 of the ICCPR, applies to military tribunals, just as it does to the civilian and other specialised tribunals.[86] Similarly, the ACHPR has stressed that military tribunals must be subject to the same requirements of fairness, justice and due process.[87] Principle 2 of the U.N. Principles on Military Justice[88] also emphasises that "...military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial." Military tribunals are therefore not an exception as regards the obligation to protect and uphold the right to a fair trial. The right to a fair trial imposes on states, the duty to organise their courts (including military tribunals) in such a way that they comply with each of its requirements.[89] This includes complying with the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The extent to which Uganda's military justice system complies with this right is the major focus of this thesis.

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[83] Baderin MA (2006), "A Comparative Analysis of the Right to a Fair Trial and Due Process Under International Human Rights Law and Saudi Arabian Domestic Law," *International Journal of Human Rights*, Vol.10, No.3, p.241.

[84] Supra notes 9 and 10.

[85] The doctrine of *pacta sunt servanda* provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This doctrine which is a principle of customary international law is codified in Article 26 of the Vienna Convention on the Law of Treaties, 1969. The Vienna Convention on the Law of Treaties was adopted on 23 May 1969 at Vienna, entered into force on 27 January 1980. For a detailed analysis of the doctrine of *pacta sunt servanda*, see, Dixon M and McCorquodale R (2003), *Cases and Materials on International Law*, Fourth Edition, Oxford University Press, Oxford, pp.67-68.

[86] HRC General Comment No.32 (2007), supra note 11, para.22.

[87] Supra note 12.

[88] Supra note 14.

[89] See *Gunes v. Turkey*, Application No. 31893/96, ECHR para.31. See also *Pelissier and Sassi v. France*, (2000) 30 EHRR 715, para.74.

To date, the extent to which Uganda's military justice system complies with the right to a fair trial remains a matter of speculation. In Uganda, like in many African states, the question of military justice and the right to a fair trial hardly receives any scholarly attention or inquiry. This is despite the important role that the right to a fair trial plays in ensuring justice and the rule of law. This could be partly attributed to the fact that for most part, military justice is not considered as an integral part of the general system of justice in Uganda.[90] As such, the administration of military justice is often left out of many initiatives aimed at improving the administration of justice in the country. For instance, under the Justice, Law and Order Sector (JLOS) which is a sector wide reform process ongoing across the entire sector, several studies have been commissioned and done on the question of administration of justice in Uganda, but there is none that focuses on the issue of military justice. In fact, a review of the key documents of JLOS suggests that the administration of military justice is not part of its agenda.[91]

The net effect of all this, in particular the failure to have any comprehensive analytical study on the question of military justice and the right to a fair trial has been the introduction of reforms that do not address the fundamental issues as far as helping Uganda's military justice system to comply with the country's international human rights obligations is concerned. For instance, although the UPDF Act 2005 was intended to streamline Uganda's military law with the Constitution and the country's international obligations, inter alia, an analysis of the reforms introduced therein hardly shows any improvement in the area of military justice,

[90] That this is the case is evident in the case of *Uganda Law Society v. Attorney General*, Constitutional Petition No. 18 of 2005 [2006] UGCC 10 (31 January 2006). In this case, Justice Kikonyogo while delivering the judgement of the Constitutional Court held that General Court Martial was not subordinate to the High Court because in the first place, it was not a court of judicature under Article 129 (1) of the Constitution. The correct position was finally stated two years later by Justice Mulenga while delivering the judgement of the Supreme Court in the case of *Attorney General v. Joseph Tumushabe*, Constitutional Appeal No. 3 of 2005 [2008] UGSC 9 (9 July 2008). Justice Mulenga emphasised that although military courts are a specialised system to administer justice in accordance with military law, they are part of the system of courts that are, or deemed to be established under the Constitution to administer justice in the name of the people. He held that the General Court Martial is both a subordinate court within the meaning of Article 129(1) of the Constitution and lower than the High Court in the appellate hierarchy of courts.

[91] For most documentation concerning the JLOS programme in Uganda including the commissioned studies and annual periodical reports, see http://www.jlos.go.ug/ [Accessed on 1 April 2011].

especially in as far as the right to a fair trial is concerned. Among other reasons, this could plausibly be attributed to the fact that the military law reform process was never informed by any incisive research on the question of military justice and human rights. In fact, with due respect, a review of the relevant Hansards shows that the Parliamentary debate leading to the enactment of the UPDF Act 2005 was shallow, uninformed and sometimes misinformed on the question of military justice and the right to a fair trial.[92] It is in this regard that a thesis of this nature becomes imperative for triggering and informing future reform of the country's military justice system to ensure that it complies with the minimum international human rights standards for administering justice.

1.3. Hypothesis and Major Research Questions

This thesis is premised on the hypothesis that despite attempts at reform, Uganda's military justice system is still, in many ways, stuck in its historical origins and falls far too short of complying with the country's international human rights obligations as far as the right to a fair trial is concerned.[93] This not only violates the internationally guaranteed rights of persons subject to military law but also renders the country's military justice system susceptible to abuse and manipulation in ways inimical to democracy and the rule of law. The analysis in this thesis is guided by and seeks to answer six major questions viz.,

1. What is military justice? Is military justice, justice? What are the justifications for having military justice as a separate system of administration of justice? To what extent are these justifications valid in Uganda's circumstances?
2. What are Uganda's international human rights obligations in the administration of military justice as far as the right to fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal is concerned?

[92] See generally, The Republic of Uganda, Parliamentary Debates (Hansard) Official Report, Fourth Session – First Meeting Issues No.26, 27 and 28 of 2004, and 29, 30 and 31 of 2005.

[93] The use of the words "historical origins" in this hypothesis and entire thesis is intended to only highlight the obsolete nature of Uganda's current military justice system. These words are intended to emphasise the point that Uganda's military law in essence retains many of the deficiencies (as far as the right to a fair trial is concerned) that characterised the country's first military justice legal frameworks (in the late 1890s and early 1900s) which came from the British Parliament.

3. How has Uganda's military justice system performed over the years as far as guaranteeing and upholding the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal is concerned?
4. To what extent does Uganda's current military justice legal framework comply with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal?
5. What are the implications of the right to a fair trial noncompliant military justice system for democracy and the rule of law?
6. What areas in Uganda's military justice legal framework require reform and what reforms are needed to make the system compliant with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal?

1.4. Objective and Significance of this Thesis

The major objective of this thesis is to analyse the compliance of Uganda's military justice system with the right to a fair trial as understood in international human rights law. Its major significance is that it identifies areas in Uganda's military justice system that require reform and provides recommendations that can be adopted to make the system compliant with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. In this way, this research is expected to be a very important trigger for the reform of Uganda's military justice system to ensure that it complies with the country's international human rights obligations. This will greatly contribute to ensuring that members of Uganda's armed forces and other persons subject to the country's military law enjoy their internationally guaranteed right to a fair trial.

This thesis is also expected to contribute to improving the rule of law and advancement of democracy in Uganda, especially if the recommendations proposed herein are adopted and effectively implemented. In light of the fact that the question of administration of military justice in Uganda is an area that has hardly been researched and written about, this thesis will also provide very useful information on the subject for academics, law and policy makers, legal practitioners, students and military personnel. It is also expected that this thesis will lead to the development of curriculum on the question of Military Justice, Human Rights and the Law to trigger the teaching of the subject in Uganda's institutions of higher learning.

1.5. Scope

The right to a fair trial as provided for in international human rights law is very broad and multifaceted. It includes the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,[94] the right to be presumed innocent until proved guilty according to law[95] and the minimum guarantees stipulated in Article 14 (3) of the ICCPR. These include: the right of accused persons to be informed promptly about the charges against them;[96] the right to adequate time and facilities for the preparation of their defence;[97] the right to be tried without undue delay;[98] the right to legal counsel;[99] the right to examine, or have examined the witnesses against them;[100] the right to an interpreter[101] and the right against self-incrimination.[102] The right to a fair trial also includes the right of convicted persons to have their conviction and sentence reviewed by a higher tribunal[103] and the right not to be subjected to double jeopardy.[104]

In their totality, the above highlighted guarantees for ensuring a fair trial constitute the minimum international human rights standards for the administration of justice in any democratic society. Failure to meet the requirements of one element is enough to constitute noncompliance with the right to a fair trial. It is for this reason that it is always important to analyse the right to a fair trial as a whole. However, from its breadth as summarised above, it is clear that a thorough appraisal of all these elements of the right to a fair trial in Uganda's military justice system cannot be covered in this thesis owing to the required word limits. For purposes of manageability therefore, this research mainly focuses on appraising the right to a fair and public hearing by a competent, independent and impartial tribunal in Uganda's

[94] Article 14(1) of the ICCPR.

[95] Ibid, Article 14 (2).

[96] Ibid, Article 14 (3) a.

[97] Ibid, Article 14 (3) b.

[98] Ibid, Article 14 (3) c.

[99] Ibid, Article 14 (3) d.

[100] Ibid, Article 14 (3) e.

[101] Ibid, Article 14 (3) f.

[102] Ibid, Article 14 (3) g.

[103] Ibid, Article 14 (5).

[104] Ibid, Article 14 (7).

military justice system. In spite of this limitation in scope, it is gratifying that the focus covers the core of the right to a fair trial.

In appraising the right to a fair and public hearing by a competent, independent and impartial tribunal, we mainly focus on analysing Uganda's military justice legal framework. As Decary J rightly emphasised, in examining the compliance of certain aspects of military justice with human rights standards, "...legislative and regulatory provisions speak for themselves and if they are prima facie an infringement of the rights guaranteed… no further evidence is necessary."[105]

1.6. Literature Review

There is very little scholarly work on the question of military justice and human rights both at the international and national level. In particular, there is no comprehensive analytical study that has examined the compliance of Uganda's military justice system with the minimum international standards for the administration of justice embedded in the right to a fair trial. The literature on the topic under study in this thesis is therefore very limited. Having considered the literature on the concept of military justice in the analysis in Section 1.1 above, in this Section, we mainly analyse literature on the right to a fair trial especially as it relates to the administration of military justice. This literature can generally be reviewed under the following themes.

1.6.1. The Right to a Fair Trial as an Internationally Guaranteed Human Right

The right to a fair trial as a human right is perhaps the only thematic area of this study with relatively sufficient literature. The major literature that has considered the right to a fair trial as a human right include: Harris' classic article which analyses the right to a fair trial as a human right with reference to the provisions of the ICCPR, the ECHR and the draft Inter-America Convention on Human Rights;[106] Weissbrodt's text which gives an account of the drafting history of the right to a fair trial provisions in the UDHR and the ICCPR and tries to

[105] *R v. Genereux* (1990) 5 C.M.A.R. 38, p.59.

[106] Harris D (1967), "The Right to a Fair Trial in Criminal Proceedings as a Human Right," *The International and Comparative Law Quarterly*, Vol. 16, No.2, pp. 352-378.

explore how they have been interpreted especially by the HRC;[107] and Trechsel's book which discusses human rights issues in criminal proceedings.[108] Although this literature has been very important in providing some insights to this research, it is mainly written in general terms. Most of it also precedes important human rights instruments and pronouncements of the HRC in which different aspects of the right to a fair trial have been interpreted and expounded upon. This is for instance true of Harris' work which precedes the adoption of the UN Basic Principles on the Independence of the Judiciary[109] and the two HRC authoritative General Comments on the right to a fair trial.[110] Although Weissbrodt's work was published much later i.e. in 2001, it is based on HRC General Comment No.13 (1984)[111] which has since been replaced by HRC General Comment No.32 (2007).[112] Since 2001, the HRC has also passed many decisions of great importance to the right to a fair trial which need evaluation; a task that is undertaken in this thesis. Further, in none of the above mentioned works have the authors attempted to analyse the right to a fair trial from the African regional human rights perspective. They mainly discuss the right to a fair trial as provided for either under the ICCPR, the ECHR, or the ACHR. This thesis not only analyses the right to a fair trial from the ICCPR perspective, but also as provided for in the African Charter.

1.6.2. Military Justice and the Internationally Guaranteed Right to a Fair Trial

At the international level, there are mainly four important works which have dealt with the issue of military justice and the right to a fair trial, i.e. the Organisation for Security and

[107] Weissbrodt D (2001), *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, the Hague.

[108] Trechsel S (2005), *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford.

[109] Adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders in Milan, 26 August - 6 September 1985, U.N.Doc. A/conf./121/22/Rev.1, I.B], G.A. Res. 40/146, 13 December 1985, 40 U.N. GAOR Supp (No.53) 254, U.N. Doc A/40/1007.

[110] I.e. HRC General Comment No.13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Twenty-first session 1984) and HRC General Comment No.32 (2007), supra note 11.

[111] Ibid.

[112] Supra note 11.

Cooperation in Europe (OSCE) handbook on human rights of armed forces personnel,[113] the International Commission of Jurists (ICJ) work concerning military jurisdiction and human rights violation,[114] Steiner, Alston and Goodman's text on international human rights in context[115] and Rowe's work on the impact of human rights in the armed forces.[116] Although these works have been very important in informing the analysis made in this thesis, they have certain limitations. For instance, the OSCE Handbook presents models and best practices from European countries that demonstrate how military tribunals can be organized so as to comply with the right to an independent and impartial tribunal among other human rights. This is very useful for this thesis which, inter alia, seeks to provide recommendations that can help Uganda's military tribunals to comply with the right to an independent and impartial tribunal. But the value of the models provided in the OSCE Handbook in the context of this thesis is limited given the fact that the circumstances obtaining in Uganda with regard to military justice are not the same as those in the European countries. For any model to successfully work in another country in addressing a particular challenge, the context of that particular country has to be taken into consideration. Besides, not all the models presented in the OSCE Handbook are compliant with the right to the fair trial as the OSCE might believe. For instance, as a measure to ensure independence of the military judges in Ireland, the handbook states that the military judges are appointed by the Judge Advocate General.[117] Although important, such a measure in itself is not enough to guarantee the independence and impartiality of the military judges. As was emphasised in *R v. Genereux*,[118] in such circumstances, the independence of the Judge Advocate General from the military command and the Executive has to be guaranteed in the first place.

The ICJ work while important, only focuses on the issue of the competence of military tribunals to try military personnel accused of committing human rights violations. This issue

[113] Office for Democratic Institutions and Human Rights (2008), *Hand book on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, Organisation for Security and Cooperation in Europe, Warsaw.

[114] Andreu-Guzman F (2004), *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* [Vol.1], International Commission of Jurists, Geneva.

[115] Steiner H, Alston P and Goodman R (2008), *International Human Rights in Context: Law, Politics and Morals*, Third Edition, Oxford University Press, Oxford.

[116] Rowe (2006), supra note 13.

[117] Supra note 113, p.228.

[118] Supra note 52.

is just a subcomponent of the broader question of the right to a competent tribunal in the administration of military justice which is analysed in this thesis. Beyond the right to a competent tribunal, this thesis also analyses the nature and scope of the right to a fair and public hearing by an independent and impartial tribunal and the extent to which it is guaranteed in Uganda's military justice system. Steiner, Alston and Goodman raise the fundamental question whether in the national security context, military tribunals can provide a fair trial and, if so, the circumstances under which this can be achieved.[119] They do not however discuss nor provide answers to the issues they raise. Instead, they just provide a few readings on the subject.

It is only Rowe's work which tried to address the issue of independence and impartiality of military tribunals in some appreciable detail. Rowe rightly points out that the issue of independence and impartiality of military tribunals should be looked at from the perspective of a reasonable person acquainted with all the relevant facts.[120] He notes that there are many ways to show actual and perceived independence and impartiality of the members of armed forces who serve as members of military tribunals. For instance, he argues that they should not be drawn from the same chain of command of the accused person or mingle socially during their call up for military court service with such members[121] and that they should not be assessed by their military superiors in respect of their performance as members of a military court or receive any performance-related pay which is derived in whole or in part from court duties.[122]

These are important criteria which this thesis adopts in its overall analytical framework in assessing compliance of Uganda's military justice system with the right to an independent and impartial tribunal. But beyond these criteria, as Chapter Two will establish, there are many other aspects critical for determining the independence and impartiality of military tribunals. Besides, beyond analysing the right to an independent and impartial tribunal in the administration of military justice, this thesis also examines other aspects of the right to a fair trial viz., the right to a fair hearing, the right to a public hearing and the right to a competent

[119] Supra note 115, p.433.

[120] Rowe (2006), supra note 13, p.83.

[121] Ibid.

[122] Ibid.

tribunal and analyses the extent to which these rights are guaranteed in Uganda's military justice system.

1.6.3. Uganda's Military Justice System and the Right to a Fair Trial

At the national level, there is indeed very little scholarly work on the issue of military justice and the right to a fair trial. Most of the scholarly work on Uganda's military is generally centered on the role of the army in the country's politics.[123] Among the very few scholarly works that have attempted to canvas the issue of military justice and the right to a fair trial in Uganda is Onoria's journal article about the Kotido Executions[124] and the working paper I authored on the trials and tribulations of Rtd. Col. Dr. Kiiza Besigye and the 22 others.[125] As shall shortly hereafter be highlighted, these works equally have many gaps in the context of this thesis. Onoria's article analyses the constitutionality of the Field Court Martial which tried and sentenced Corporal Omedio and Private Abdullah Mohammad. The two soldiers were indicted, tried and executed on the same day for the alleged murder of three civilians in Kotido district in North Eastern Uganda. The trial itself did not last more than three hours. He concludes that this Field Court Martial violated several fair trial and other human rights of these soldiers as guaranteed by Uganda's Constitution. The working paper on the trials and tribulations of Rtd. Col. Dr. Kizza Besigye and the 22 others mainly focused on the extent to which the General Court Martial which attempted to try Besigye and the 22 others complied with the right to an independent and impartial tribunal.

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[123] Among such works include: Omara Otunnu A (1987), *Politics and the Military in Uganda, 1890-1985*, MacMillan, London, and Ddungu E (1994), "Some Constitutional Dimensions of Military Politics in Uganda," Working Paper No.41, Centre for Basic Research Publications, Kampala. See also, Brett EA (1994), "The Military and Democratic Transition in Uganda: Neutralizing the Use of Force," in Nsibambi A (Ed), *Managing the Transition to Democracy in Uganda under the National Resistance Movement*, Report of the Uganda Democratisation Study for the Global Coalition for Africa and the African Leadership Forum, Makerere Institute of Social Research, Kampala, and Khiddu-Makubuya E (1994), "The Military Factor in Uganda," in Khiddu-Makubuya E, Mwaka WM, and Okoth PG (Eds), *Uganda: Thirty Years of Independence, 1962-1992*, Makerere University, Kampala.

[124] Onoria (2003), supra note 37.

[125] Naluwairo R. (2006), "The Trials and Tribulations of Rtd. Col. Dr. Kiiza Besigye and 22 Others: A Critical Evaluation of the Role of the General Court Martial in the Administration of Justice in Uganda," Working Paper No.1, HURIPEC Publications, Kampala.

The following points must be made regarding the above works in the context of this thesis. First, the works highlighted above focus on the specific trials and the particular circumstances surrounding those trials. While they attempt to address the issue of independence and impartiality of courts martial in Uganda, they mainly focus on the particular military courts. In the case of Onoria's work, he focused on the Field Court Martial which tried the two convicts. Regarding the paper on the trials and tribulations of Dr. Kiiza Besigye, the focus was on the General Court Martial. Over and above the General Court Martial and the Field Court Martial, this research analyses the extent to which the other military courts i.e. the Court Martial Appeal Court, the Division Courts Martial, the Unit Disciplinary Committees and the Summary Trial Authority comply with not only the right to an independent and impartial tribunal, but also the right to a fair and public hearing by a competent tribunal. Further, beyond analysing the compliance of Uganda's military justice system with the right to a fair and public hearing by a competent, independent and impartial tribunal, this thesis also explores the implications of a fair trial noncompliant military justice system on democracy and the rule of law. Also, unlike the works highlighted above, this thesis not only examines the concept of military justice, but also analyses its validity in the context of Uganda's situation. Finally, this thesis explores the historical foundation and evolution of Uganda's military justice system especially as it relates to the protection and respect of the right to a fair trial which none of the above mentioned scholarly works did. It therefore follows that while the above highlighted scholarly works have been instrumental in informing this research, they have many gaps which this thesis addresses.

1.7. Methodology

This thesis adopts a combination of mainly qualitative legal research methods in gathering and analysing relevant data. These include literature review, comparative, descriptive and prescriptive methodologies. It draws upon the analysis of both primary and secondary sources. Although this is largely a legal research, it is recognized that there are certain historical, sociological and philosophical underpinnings of the concept of military justice. In order to put this research in context therefore, as part of the introduction and background, the thesis begins in Section 1.1 with the analysis of the concept of military justice. This analysis not only explores and examines the justifications of military justice as a separate system of administration of justice, but also analyses the extent to which those justifications are valid in Uganda's context.

1.7.1. Analysis of International and Regional Human Rights Instruments

A critical analysis of the relevant international and regional human rights instruments to which Uganda is party is undertaken in Chapter Two to establish the nature and scope of Uganda's human rights obligations as regards the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. In particular, relevant provisions of the ICCPR and the African Charter are examined. Other regional and international human rights instruments and materials in which the right to a fair and public hearing by a competent, independent and impartial tribunal has been elaborated and affirmed are also analysed. These include; the HRC's General Comment 32 (2007),[126] the UN Principles on Military Justice,[127] the UN Basic Principles on the Independence of the Judiciary[128] and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (herein after referred to as "the African Commission Principles").[129] Although these materials are considered to be soft law and therefore not legally binding, they serve as important interpretative aids for the relevant binding treaty provisions on which this thesis is based.

1.7.2. Appraisal of Relevant Case Law and Concluding Observations of the HRC

There are many cases arising from the different regional and international human rights instruments which have repeatedly dealt with the issue of administration of military justice, that it can now be said that an international body of military justice jurisprudence is emerging.[130] To complement the examination of relevant international human rights instruments mentioned in Section 1.7.1 above, a critical appraisal of this emerging military justice case law jurisprudence from the HRC and the ACHPR is undertaken in Chapter Two. This is further complemented by the analysis of the Concluding observations of the HRC on the periodic reports of states party to the ICCPR. With particular reference to these

[126] Supra note 11.

[127] Supra note 14.

[128] Supra note 109.

[129] Adopted by the ACHPR at its 33rd Ordinary Session in Niger, May 2003, DOC/OS(XXX)247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005). For a scholarly analysis of these Principles and Guidelines, see, Baderin M (2005), "Recent Developments in the African Regional Human Rights System," *Human Rights Law Review*, Vol.5, No.1, pp.124-129.

[130] Fidell ER, Hillman EL and Sullivan DH (2007), *Military Justice: Cases and Materials*, LexisNexis, p.xi.

Concluding observations, the HRC General Comments and case law jurisprudence, it is important to emphasise that the HRC is the authoritative interpreter of the rights articulated in the ICCPR.[131] Therefore, although there is debate regarding the status of its decisions, what is clear is that, as Conte and Burchill put it, when it pronounces itself upon the content or meaning of a right contained in the ICCPR, "it does so with undeniable authority."[132]

In substantiating many issues raised in this thesis, reference is also made to comparative case law from the ECrtHR. This is not only because of easy access and availability of cases from the ECrtHR, but most important, the ECrtHR has a well-developed body of jurisprudence on issues of military justice and human rights, in particular the right to a fair hearing by an independent and impartial tribunal as guaranteed by Article 6 (1) of the ECHR. This provision is in essence the same as Article 14 (1) of the ICCPR which is the major focus of this thesis. It is significant that decisions of the ECrtHR are increasingly referred to and cited with approval by the HRC and other human rights supervisory bodies. Therefore, although the decisions of the ECrtHR are not legally binding on Uganda or African countries, they are highly persuasive and have actually been cited as persuasive authority in many decisions of the ACHPR.[133] Where necessary, comparative jurisprudence from the superior courts of the United Kingdom (in particular England), the United States of America and Canada (three countries that have also had a lot of litigation on issues of military justice and human rights) is also considered to strengthen the analysis in this thesis.

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[131] Romany C (1996), "Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender," *Brooklyn Journal of International Law*, Vol.21, No.3, p.884.

[132] Conte A and Burchill R (2009), *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee*, Second Edition, Ashgate Publishing Limited, Surrey, p.9.

[133] For instance, in *Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. The Sudan*, Comm Nos. 279/03, 296/05 (2009), para.147, while holding that the duty of the state to protect the right to life is very broad, it quoted the ECrtHR's cases of *McCann v. United Kingdom* (1995) 21 EHRR 97 and *Tanrikulu v. Turkey* (1999) 30 EHRR 950 as authority that the state's duty in that regard includes taking preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. In *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Comm No. 155/96 (2001), para.57, the ACHPR cited *X and Y v. Netherlands*, 91 ECHR (1985) (Ser.A) 32 as authority for the preposition that there is an obligation on government to take steps to ensure that the enjoyment of human rights is not interfered with by any other private person.

Together, the review and analysis of the human rights instruments highlighted above and the relevant case law will mainly answer the question regarding the nature and scope of Uganda's international human rights obligations as regards the right to a fair trial and the issue whether or not and to what extent the right to a fair trial applies in the administration of military justice.

1.7.3. Examination of Uganda's Military Justice Legal Framework

It is part of the hypothesis of this research that Uganda's military justice as it relates to the protection of the internationally guaranteed right to a fair trial (in particular the right to a fair and public hearing by a competent, independent and impartial tribunal) is still in many ways stuck in its historical origins. To test this part of the hypothesis, a critical examination of Uganda's military justice legal framework during the colonial period right from the establishment of the country's army as a national institution in 1895 is undertaken in Chapter Three. This comprises analysis of the Uganda Rifles Ordinance 1895, the Uganda Military Force Ordinance 1899, the King's African Rifles Ordinance 1902 and the Uganda Military Force Ordinance 1958. Examination of these legal instruments establishes the historical foundation, origins and evolution of Uganda's military justice system especially as it relates to the right to a fair and public hearing by a competent, independent and impartial tribunal.

Perhaps the most important and deeply entrenched principle of international law is that existing treaty obligations must be fulfilled by the parties in good faith. This principle is what is commonly referred to as the doctrine *pacta sunt servanda*.[134] In majority of the international human rights instruments, as the first major necessary step, states are required to fulfill their obligations by way of putting in place relevant legislative and administrative measures.[135] The starting point therefore in analyzing the extent to which Uganda's military justice system complies with its international human rights obligations as regards the right to a fair and public hearing by a competent, independent and impartial tribunal is to examine the country's legal framework governing military justice. A comprehensive review and analysis of Uganda's current military justice legal framework *vis-à-vis* the country's international human rights obligations regarding the right to a fair and public hearing by a competent, independent and impartial tribunal is therefore undertaken in this respect in Chapter Four.

[134] For further details about this principle, see supra note 85.

[135] See for instance Article 2 (2) of the ICCPR, supra note 9.

This review covers Uganda's 1995 Constitution as amended, the UPDF Act 2005 and the rules and regulations made thereunder. It also includes analysis of the parliamentary debates leading to the enactment of the UPDF Act 2005 and its predecessor – the UPDF Act 1992.

1.7.4. Case Study

It is one of the arguments of this thesis that a military justice system that does not conform to the minimum international human rights standards for administration of justice embedded in the right to a fair trial can be inimical to democracy and the rule of law. To demonstrate this, in Chapter Five, using the case of *Rtd. Col. Dr. Kizza Besigye and the 22 others*,[136] we examine the major implications of a fair trial noncompliant military justice system on democracy and the rule of law. The case of Rtd. Col. Dr. Kizza Besigye has been chosen not only because of its political overtones but also because it represents one of the very few cases involving questions of military justice and human rights under Uganda's current military justice legal framework in which the country's superior courts of record including the High Court, the Constitutional Court and the Supreme Court were heavily involved. Although Chapter Five mainly focuses on the case of Rtd. Col. Dr. Kiiza Besigye and the 22 others, reference is also made to the case of *Major General David Tinyefuza v. Attorney General*[137] to strengthen the analysis made therein.

1.8. Outline of the Thesis

This thesis is divided into seven chapters. Chapter One gives the background and provides the context in which this research is undertaken and should be understood. Chapter Two explores and analyses the nature and scope of Uganda's international human rights obligations as regards the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. Chapter Three is an analytical exploration of the historical origins and evolution of Uganda's military justice system especially as regards the protection and respect of the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. The analysis in Chapter Three covers the period 1895-1992. A detailed assessment of the compliance of Uganda's current military justice legal framework with the right to a fair and public hearing by a competent, independent and impartial tribunal is undertaken in Chapter

[136] Criminal Case No. UPDF/GCM/075/2005.

[137] *Major General David Tinyefuza v. Attorney General*, Constitutional Petition No.1 of 1996.

Four. Using the case of *Rtd. Col. Dr. Kiiza Besigye and the 22 others*, Chapter Five demonstrates how a military justice system that does not comply with the right to a fair trial can have adverse implications for democracy and the rule of law. Chapter Six presents the major recommendations of this thesis which can help to ensure compliance of Uganda's military justice system with the right to a fair trial, in particular, the right to a fair and public hearing by a competent, independent and impartial tribunal. Chapter Seven is the conclusion of this thesis.

CHAPTER TWO

THE NATURE AND SCOPE OF THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL HUMAN RIGHTS LAW

This Chapter is an analysis of the right to a fair trial as guaranteed by international human rights law, in particular under the ICCPR.[1] It specifically explores the nature and scope of Uganda's international human rights obligations with respect to the right to a fair and public hearing by a competent, independent and impartial tribunal, especially insofar as the administration of justice by military tribunals is concerned. The Chapter begins in Section 2.1 by highlighting the importance of the right to a fair trial in a democratic society emphasising the reason why it occupies a special place in international human rights law. In Section 2.2 we analyse the nature of proceedings to which the right to a fair trial applies. This is critical for the reason that, as shall be discussed in this section, the right to a fair trial does not apply to every proceeding before courts or tribunals.[2] It is therefore important in a thesis of this nature to first ascertain the nature of those proceedings in military tribunals to which the right to a fair trial applies. Section 2.3 which constitutes the main body of this Chapter analyses the nature and scope of the right to a fair and public hearing by a competent, independent and impartial tribunal especially as it relates to the administration of

[1] The main reason for focusing on the ICCPR is because it is the major international human rights binding instrument providing for the protection of the right to a fair trial. We however also try to analyse the right to a fair trial from the African regional human rights perspective, in particular under the African Charter. The African Charter is the main African regional human rights binding instrument protecting the right to a fair trial. As pointed out in Chapter One (notes 9 and 10), Uganda is party to both the ICCPR and the African Charter.

[2] In this thesis, the words "court" and "tribunal" will be used interchangeably. The two words in essence mean the same thing i.e. bodies established by law with judicial power to adjudicate on disputes in accordance with the law. The HRC has stated in this regard that the notion of a "tribunal" in Article 14 (1) of the ICCPR "designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislature branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature." See UN Human Rights Committee, *General Comment No.32 (Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial)*, adopted at the Ninetieth Session of the Human Rights Committee, 23 August 2007, CCPR/C/GC/32, para.18.

justice by military tribunals. The summary and conclusion of the analysis undertaken in this Chapter is presented in Section 2.4.

2.1 The Importance of the Right to a Fair Trial in a Democratic Society

The importance of the right to a fair trial in a democratic society cannot be over-emphasized. In its entire breadth,[3] the right to a fair trial constitutes the most important human right in the administration of justice in any democratic society.[4] Emphasising this point with regard to the main fair trial provision in the ECHR, the ECrtHR has stressed that "…in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and purpose of that provision."[5] Through the various guarantees that it provides in the conduct of trials (critical among which include the right to a fair and public hearing by a competent, independent and impartial tribunal), the right to a fair trial guarantees neutrality in the adjudication of disputes and ensures that justice is not only done, but is also manifestly and undoubtedly seen to be done. In this connexion, it is arguable that, especially in criminal proceedings (which are the main stay of military tribunals), the notions of justice and fair trial are inseparable. One cannot or at least will not be seen to get justice from a tribunal that is not neutral and which does not guarantee the other fair trial rights and procedures.

The right to a fair trial is also critical for ensuring and safeguarding the rule of law[6] which is a fundamental feature of any democratic society.[7] It is indeed debatable,

[3] For the scope of the right to a fair trial, see Chapter One, Section 1.5.

[4] See HRC General Comment 32 (2007), supra note 2, para.2.

[5] See *Delcourt v. Belgium* (1970) 1 EHRR 355, para.26.

[6] HRC General Comment 32 (2007), supra note 2, para.2.

[7] This does not necessarily mean that states that respect the rule of law are democratic. In the modern human rights discourse, for a society to be generally accepted as democratic, it takes more than respect for the rule of law. In its Resolution 2002/46, para.1, the United Nations Commission on Human Rights, now the United Nations Human Rights Council, declared the essential elements of democracy (features of a democratic society) to include: respect for human rights and fundamental freedoms; freedom of association; freedom of expression and opinion; access to power and its exercise in accordance with the rule of law; holding of periodic free and fair elections by secret ballot as the expression of the will of the people; a pluralistic system of political parties and organisations; the

whether without a judicial system that guarantees fair trial rights; there can be any rule of law. It is only through fair trial rights compliant tribunals, that the compliance of individuals' and states' actions and omissions with the law can be impartially and properly assessed and appropriate legal remedies and punishments given. In this regard, the right to a fair trial is an integral part of the very notion of the rule of law in a democratic society.

Further, the right to a fair trial is paramount in the effective protection of all other human rights and fundamental freedoms.[8] Without it, all other rights and freedoms remain at risk.[9] As Baderin rightly points out, "… the protection of all other human rights in a state depends, inter alia, on the availability of fair trial and due process procedures in domestic courts through which remedies can be sought for human rights violations."[10] Without guaranteeing fair trial procedures in courts, the effective protection of human rights and other fundamental freedoms therefore remains illusory.

It is for the above reasons, inter alia, that the right to a fair trial occupies a central place in international human rights law. It is recognised and protected by all major international and regional human rights instruments i.e. the UDHR[11], the ICCPR,[12] the African Charter,[13] the ECHR[14] and the American Convention on Human Rights (ACHR).[15] While reservations can be made to particular aspects of the right to a fair

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separation of powers; the independence of the judiciary; transparency and accountability in public administration; and free, independent and pluralistic media.

[8] HRC General Comment 32 (2007), supra note 2, para.2. See also *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria,* African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998), para.30.

[9] Robertson D (2004), *A Dictionary of Human Rights*, 2nd Edition, Europa Publications, London, p.86.

[10] Baderin M (2006), "A Comparative Analysis of the Right to a Fair Trial and Due Process Under International Human Rights Law and Saudi Arabian Domestic Law," *International Journal of Human Rights*, Vol.10, No.3, p.241.

[11] Article 10.

[12] Article 14.

[13] Article 7.

[14] Article 6.

[15] Article 8.

trial under Article 14 of the ICCPR, it is not acceptable to make general reservations to the right to a fair trial as a whole.[16] The HRC has emphasised that such reservations would be incompatible with the object and purpose of the ICCPR.[17] Also, owing to the importance that the right to a fair trial plays in providing "...the minimum protection to citizens and military officers alike, especially under unaccountable and undemocratic military regimes...,"[18] the ACHPR has argued that the right to a fair trial should be considered non-derogable.[19] In fact, in *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*,[20] the ACHPR observed that the African Charter unlike other human rights instruments does not allow for states to derogate from their treaty obligations during emergency situations.[21] This means therefore that the provisions of the African Charter dealing with the right to a fair trial are non-derogable even during times of emergency.[22] In the above case, the ACHPR held that even a civil war in Chad could not be used as an excuse by the State violating or permitting violations of rights in the African Charter.[23]

Although the ICCPR does not specifically list the right to a fair trial as non-derogable, the HRC has also emphatically emphasised that states derogating from normal procedures required under Article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.[24] It has stressed that guarantees of fair trial may never be made

[16] HRC General Comment 32 (2007), supra note 2, para.5. See also HRC General Comment No.24 (on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant), adopted at the Fifty-second Session of the Human Rights Committee, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para.8.

[17] HRC General Comment 32 (2007), ibid.

[18] *Civil Liberties Organisation, et al v. Nigeria*, supra note 8, para.27.

[19] Ibid.

[20] *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, African Commission on Human and Peoples' Rights, Comm. No. 74/92 (1995), para.21.

[21] See also *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Communication No. 48/90, 50/91, 89/93 (1999), para.42.

[22] Baderin (2006), supra note 10, p.245.

[23] Supra note 20.

[24] HRC General Comment 32 (2007), supra note 2, para.6.

subject to measures of derogation that would circumvent the protection of non-derogable rights.[25] For it is inherent in the protection of rights explicitly recognised as non-derogable in Article 4 (2) of the ICCPR, that they must be secured by procedural guarantees, including, often judicial guarantees.[26] In fact, the HRC has long declared that certain aspects of the right to a fair trial under Article 14 of the ICCPR cannot be the subject of derogation even under emergency situations. It has argued inter alia that:

> …safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay the lawfulness of the detention, must not be diminished by a state party's decision to derogate from the covenant."[27]

It can only be emphasised in light of the HRC's conclusion above that it is in fact not any court of law that should try persons for criminal offences, it is only competent, independent and impartial tribunals that can properly without bias determine the merits of a particular case according to law. Because of the great importance that the HRC attaches to the right to a fair trial, it has, just like the ACHPR, proposed that the right to a fair trial should be included among the non-derogable rights provided in Article 4 (2) of the ICCPR.[28]

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[25] Ibid.

[26] Ibid.

[27] HRC *General Comment No.29 (Article 4: Derogations during a State of Emergency)*, Adopted at the Seventy-second Session of the Human Rights Committee, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para.16. See also Weissbrodt D and De la Vega C (2007), *International Human Rights Law: An Introduction*, University of Pennsylvania Press, Philadelphia, p.60.

[28] See the Draft Third Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I to: "The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening," Final Report to the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities by Mr. Stanislav Chernichenko and Mr.

The importance of the right to a fair trial is further reflected in the fact that it is protected by most Constitutions of states in the world;[29] a practice which Baderin rightly argues, demonstrates the existence of state practice and *opino juris* necessary to constitute the right to a fair trial generally as a norm of Customary International Law (CIL).[30] This means that even if Uganda was not a state party to any human rights instrument protecting the right to a fair trial, it would still, as a general rule, be bound to protect and respect that right as a norm of CIL. The custom of most Constitutions protecting the right to a fair trial could in fact in itself also qualify the right to a fair trial as a general principle of law recognized by civilized nations within the meaning of Article 38 (1) c of the Statute of the International Court of Justice.[31] The importance and force of the right to a fair trial in a democratic society cannot therefore be under estimated. But important as it is, does it mean that the right to a fair trial applies to all proceedings before courts? Specifically, in the context of military justice, does the right to a fair trial apply to all proceedings before military tribunals? These are some of the important questions addressed in Section 2.2 below.

2.2 Proceedings in Military Tribunals to Which the Right to a Fair Trial Applies

"In the determination of *any criminal charge against him, or of his rights and obligations in a suit at law*…everyone shall be entitled to a fair and public hearing by

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William Treat on The Administration of Justice and the Human Rights of Detainees, E/CN.4/Sub.2/1994/24, 3 June 1994.

[29] See for instance, the International Constitutional Law website: http://www.servat.unibe.ch/law/icl/index.html [Accessed on 1 April 2011].

[30] Baderin (2006), supra note 10, p.244. See also Robinson P (2009), "Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY," *Berkeley Journal of International Law Publicist*, Vol.3, p.5. For a discussion of custom as a source of international law, see Dixon M and McCorquodale R (2003), *Cases and Materials on International Law*, Oxford University Press, Oxford, pp.28-42.

[31] For a thorough discussion of general principles of law as a source of international law within the meaning of the Statute of the International Court of Justice, see Brownlie I (2008), *Principles of Public International Law*, Seventh Edition, Oxford University Press, Oxford, pp.16-19. See also Dixon and McCorquodale (2003), supra note 30, pp.43-47 and Harris D J (2004), *Cases and Materials on International Law*, Sweet and Maxwell, London, pp.44-50.

a competent, independent and impartial tribunal established by law,"[32] states Article 14 (1) of the ICCPR. Similarly, the UDHR declares in Article 10 that "everyone is entitled…to a fair and public hearing by an independent and impartial tribunal, in the determination of his *rights and obligations and of any criminal charge against him*."[33] Although the African Charter does not have an equivalent or similar phrase, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (hereinafter referred to as "the African Commission Principles")[34] in similar expression state that "In the determination of *any criminal charge against a person, or of a person's rights and obligations*, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body."[35]

It is therefore clear from the above provisions that the right to a fair trial applies to two kinds of proceedings i.e. proceedings involving determination of a criminal charge and those involving determination of a person's rights and obligations in a suit at law. By their very nature, military tribunals rarely deal with the latter class of proceedings. These are therefore deliberately left out of the scope of this thesis. Suffice to point out however, that the HRC has clarified that the concept of determination of rights and obligations "in a suit at law" is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.[36] It has also emphasised that "there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative control, such

[32] Emphasis added.

[33] Emphasis added.

[34] Adopted by the ACHPR at its 33rd Ordinary Session in Niamey-Niger, May 2003, DOC/OS(XXX)247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005).

[35] Section A (1). Emphasis added.

[36] See HRC General Comment 32 (2007), supra note 2, para.16. The HRC has stated that the concept of a "suit at law" encompasses (a) judicial procedures aimed at determining rights and obligations pertaining to the areas of contract, property and torts in the area of private law, as well as (b) equivalent notions in the area of administrative law such as the termination of employment of civil servants for other than disciplinary reasons, the determination of social security benefits or the pension rights of soldiers, or procedures regarding the use of public land or the taking of private property. Ibid.

as disciplinary measures not amounting to penal sanctions being taken against a civil servant, *a member of the armed forces,* or a prisoner."[37]

With regard to proceedings involving determination of a criminal charge, a few pertinent questions must be posed at this point: What constitutes a "criminal charge?" What is a "charge" in the first place? How is a criminal charge different from other charges one may face in the context of military justice such as disciplinary charges? The HRC has stated that "…criminal charges relate in principle to acts declared to be punishable under domestic criminal law."[38] This means that in ascertaining whether there is a criminal charge for purposes of application of the right to a fair trial, the classification of the offence (with which one is charged) under national law is a factor that should be taken into account.

However, where domestic law classifies certain offences as not criminal, other factors come into play. The HRC has thus stressed that "…the notion of a criminal charge may also extend to acts that are criminal in nature with the sanctions that, regardless of their qualifications in domestic law, must be regarded as penal because of their purpose, character or severity."[39] Although the HRC gives no reason for this extension of the notion of a criminal charge, the ECrtHR has stressed, in the context of the ECHR, whilst emphasising that the "autonomy" of the concept of "criminal" operates only one way, that:

> The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects…The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane,

[37] Ibid, para.17. Emphasis added.

[38] Ibid, para.15.

[39] Ibid. See also *Perterer v. Austria*, U.N. Doc. CCPR/C/81/D/1015/2001 (2004), para.9.2. This is also the position underscored by the ECrtHR in a number of cases including the leading case of *Engel v. Netherlands* (1976) 1 EHRR 647.

> the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 …to satisfy itself that the disciplinary does not improperly encroach upon the criminal.[40]

This reasoning by the ECrtHR is very convincing. It is critical for ensuring that States do not abuse their power and deny individuals their right to a fair trial by merely designating certain acts or omissions as disciplinary. It therefore follows that three factors are key in determining whether or not particular proceedings amount to the determination of a criminal charge, viz., classification of the particular offence/charges under national law, the very nature of the offence (i.e. whether it is in essence criminal)[41] and the nature and degree of severity of the penalty that the person concerned risks incurring. Regarding the last criteria, an important principle that can be established from *Engel v. Netherlands*[42] concerning proceedings before military tribunals, is that, regardless of the classification of the offence with which someone is charged, if the penalty to be incurred involves deprivation of liberty and where the duration and manner of its execution is appreciably detrimental, then the proceedings will amount to "determination of a criminal charge," in which case the right to a fair trial will apply. In this case, the ECrtHR emphasised that "...in a society subscribing to the rule of law, there belong to the 'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration, or manner of execution cannot be appreciably detrimental."[43] It noted that the maximum penalty that the supreme military court could pronounce consisted in four days' light arrest for Mr. van der Wiel, two days' strict arrest for Mr. Engel (third punishment) and three or four months' committal to a disciplinary unit for Mr. de Wit, Mr. Dona and Mr. Schul and held that Mr. van der Wiel was therefore liable only to a light punishment not occasioning deprivation of liberty.[44] The Court also noted that the penalty involving

[40] *Engel v. Netherlands*, ibid, para.81.

[41] In determining whether a particular offence in essence belongs to the criminal sphere, as Trechsel notes, recourse is normally made to comparative law, to what is customary among other states. See Trechsel S (2005), *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, p.19.

[42] Supra note 38.

[43] *Engel v. Netherlands*, supra note 39, para.82.

[44] Ibid, para.85.

deprivation of liberty that in theory threatened Mr. Engel was of too short a duration to belong to "criminal" law.[45] With respect to the "charges" against Mr. de Wit, Mr. Dona and Mr. Schul, the Court emphasised that these "... did indeed come within the "criminal" sphere since their aim was the imposition of serious punishments involving deprivation of liberty."[46]

In sum, the right to a fair trial applies to all proceedings in military tribunals involving criminal charges and/or determination of a person's rights and obligations in a suit at law. Determination of a person's rights and obligations in a suit at law does not include administrative or disciplinary proceedings involving measures not amounting to penal sanctions. Military authorities cannot however evade the application of the right to a fair trial by merely classifying proceedings as "disciplinary" or "administrative." As long as the acts or omissions in question are criminal in nature or attract penal sanctions, then such proceedings will amount to determination of a criminal charge, the effect of which renders the right to a fair trial applicable. It is important to note though that the nature of the offence with which one is charged and the nature of the penalty one risks incurring, are alternatives and not cumulative in determining whether or not the proceedings amount to determination of a criminal charge.[47] But as Beatson notes, this does not however exclude a cumulative approach where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a "criminal charge."[48]

Having established the nature of proceedings to which the right to a fair trial and therefore the right to a fair and public hearing by a competent, independent and impartial tribunal applies, it is now important that we examine the nature and scope of this right especially as it relates to military tribunals.

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[45] Ibid.

[46] Ibid.

[47] *Lauko v. Slovakia* (1998) 33 EHRR 994, para.57. See also Beatson J (Ed) (1999), *The Human Rights Act and the Criminal Justice and Regulatory Process*, University of Cambridge Centre for Public Law, p.147.

[48] Ibid.

2.3 The Nature and Scope of the Right to a Fair and Public Hearing by a Competent, Independent and Impartial Tribunal

Like most international agreements, the ICCPR and the African Charter are generally drafted in generic terms. As such, although they guarantee the right to a fair and public hearing by a competent, independent and impartial tribunal, they do not give the details of the content, nature and scope of this right. What is clear is that, as the HRC has emphasised, it cannot be left to the sole discretion of domestic law to determine the essential content of the guarantees contained in Article 14 of the ICCPR.[49] Consequently, the nature and scope of the right to a fair trial, including the right to a fair and public hearing by a competent, independent and impartial tribunal, can only be ascertained from a careful examination of the various regional and international human rights instruments and materials in which this right has been expounded. These include; the HRC's General Comment on the Right to Equality before Courts and Tribunals and to a Fair Trial,[50] the UN Basic Principles on the Independence of the Judiciary,[51] the African Commission Principles[52] and the Dakar Declaration on the Right to a Fair Trial in Africa.[53] The UN Draft Principles Governing the Administration of Justice through Military Tribunals (hereinafter referred to as "the UN Principles on Military Justice")[54] specifically address issues of the right to a fair trial within the context of military justice. Although these materials are considered as "soft law," and therefore not legally binding, they serve as very

[49] HRC General Comment 32 (2007), supra note 2, para.4.

[50] HRC General Comment 32 (2007), supra note 2.

[51] Basic Principles on the Independence of the Judiciary [adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, Milan 26 August - 6 September 1985, U.N.Doc. A/conf./121/22/Rev.1, I.B], G.A. Res. 40/146, 13 December 1985, 40 U.N. GAOR Supp. (No.53) 254, U.N. Doc A/40/1007.

[52] Supra note 34. For a scholarly over view and analysis of the African Commission Principles, see Baderin M (2005), "Recent Developments in the African Regional Human Rights System," *Human Rights Law Review*, Vol.5, No.1, pp.117-149.

[53] Adopted by the African Commission in November 1999 at its 26th Ordinary Session in Kigali, Rwanda. For an over view of this Declaration, see Murray R (2001), "The Right to a Fair Trial: The Dakar Declaration," *Journal of African Law*, Vol.45, No.1, pp.140-142.

[54] Draft Principles Governing the Administration of Justice through Military Tribunals, U.N.Doc. E/CN.4/2006/58 at 4 (2006).

important interpretive materials to the relevant binding treaty provisions. They are therefore of critical importance to the ensuing analysis.

The nature and scope of the right to a fair and public hearing by a competent, independent and impartial tribunal can also be deduced from analysing the jurisprudence of the HRC (i.e. its views and opinions on the individual communications under the First Optional Protocol to the ICCPR, its Concluding Observations on States' reports under Article 40 of the ICCPR and its other General Comments on related issues) which is going to be undertaken. The jurisprudence from other regional human rights supervisory bodies, in particular the ACHPR and the ECrtHR, is also important in this regard.

The ensuing analysis and discussion proceeds on the premise that, as stated by the HRC, the right to a fair trial as guaranteed by the ICCPR, and indeed other human rights instruments, applies in full to military tribunals just as it does to the ordinary and civilian courts.[55] Principle 2 of the UN Principles on Military Justice also emphasises that military tribunals must in all circumstances apply standards and procedures internationally recognised as guarantees of a fair trial. Specifically, Principle 13 of these Principles states, inter alia, that "…the organisation and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial." While holding that military tribunals *per se* do not imply an unfair or unjust process, the ACHPR has stated in no uncertain terms that "…*military tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process*."[56]

It is in the light of these observations that we now proceed to examine the content, nature and scope of the right to a fair and public hearing by a competent, independent and impartial tribunal. Each of the specific guarantees comprised in this right viz., the right to a competent tribunal, the right to an independent tribunal, the right to an impartial tribunal, the right to a public hearing, and the right to a fair hearing will be

[55] HRC General Comment 32 (2007), supra note 2 para.22.

[56] *Civil Liberties Organisation, et al v. Nigeria*, supra note 8, para.44. Emphasis added.

examined independently, although it is recognised that some of them are interrelated and overlap in many respects.

2.3.1. The Right to a Competent Tribunal

A critical element of the right to a fair trial and an essential factor in the administration of criminal justice in any democratic society is the right to a competent tribunal. The right to a competent tribunal is thus one of the essential guarantees protected by Article 14 (1) of the ICCPR. Although the African Charter does not explicitly provide for the right to a competent tribunal, it can be implied from Article 7 (1) (b) which states that "Every individual shall have the right to have his cause heard. This comprises: the right to be presumed innocent until proved guilty by *a competent court or tribunal*."[57] This was affirmed in *Amnesty International v. Sudan* where while holding that the fair trial guarantees provided for in Article 7 (1) of the African Charter are mutually dependent and that the infringement of one right could result in violation of others, the ACHPR held that the definition of "competent" in Article 7 (1) (b) "…encompasses facets such as expertise of the judges..."[58] Expertise of judges is undeniably a question that relates to the competence of a tribunal.

Even though the right to a competent tribunal has received very limited attention from human rights supervisory bodies and legal scholars in terms of clarifying its content and scope, it is clear that the right encompasses two major aspects i.e. jurisdiction of the tribunal and the competence of the persons who constitute the tribunal.[59] This is supported by the *travaux preparatoires* of the ICCPR. During the negotiations and drafting of the ICCPR, René Cassin the delegate from France had objected to the use of the word "competent" arguing that it referred either to the jurisdiction of the court which was too complex a matter for the Commission to address, or to the technical qualifications of judges, which could exclude the use of elected or popular judges

[57] Emphasis added.

[58] *Amnesty International v. Sudan*, supra note 21, para.62. See also Onoria, H. (2003), "Soldiering and Constitutional Rights in Uganda: The Kotido Military Executions," *The East African Journal of Peace and Human Rights*, Vol.9, No.1, p.100.

[59] See Lawyers Committee for Human Rights (2000), *What is a Fair Trial? A Basic Guide to Legal Standards and Practice*, Lawyers Committee for Human Rights, New York.

used in some countries.[60] Although there was not much discussion on Cassin's argument, his interpretation of "competent" in the above context seems to have been implicitly accepted by the delegates as the correct position when they adopted Mr. Jevremovic's amendment to the effect that the tribunal should not only be "independent and impartial," but should also be "competent."[61] It is significant that no delegate challenged Cassin's interpretation of the word "competent."

As regards the question of jurisdiction, a competent tribunal's jurisdiction must be established by law. This is in line with the fair trial requirement under Article 14 (1) of the ICCPR that the competent, independent and impartial tribunal must be established by law. The ACHPR has held that "...the purpose of requiring that courts be 'established by law' is that the organisation of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament." [62] No tribunal should confer upon itself or assume jurisdiction which the law does not give it. A competent tribunal must not only have jurisdiction over the subject matter but should also have jurisdiction over the person(s) it tries.[63] In the context of military justice, as Davidson rightly observes, competence of a tribunal also requires that a military court must be properly composed (i.e. have the correct people present), properly convened (assembled), and that the criminal charges must be properly referred to it (ordered to trial).[64]

With regard to the question of jurisdiction over the persons, an aspect that continues to raise international concern and debate is the issue of military tribunals having jurisdiction over civilians. While noting that the ICCPR does not prohibit the trial of civilians in military or special courts, the HRC has stressed that such trials should be

[60] See U.N.Doc. E/CN.4/SR.323 at 13 (2 June, 1952). For a commentary on the *travaux preparatoires* of the right to a fair trial provisions in the ICCPR and the UDHR, see Weissbrodt D (2001), *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, Martinus Nijhoff Publishers, the Hague.

[61] U.N.Doc. E/CN.4/SR. 323 at 14. (2 June, 1952).

[62] See *Civil Liberties Organisation, et al v. Nigeria*, supra note 8, para.27.

[63]Amnesty International (1998), *Fair Trials Manual*, London, para.12.3. Available online at: http://www.amnesty.org/en/library/asset/POL30/002/1998/en/947b99f9-d9b1-11dd-af2b-b1f6023af0c5/pol300021998en.html [Accessed on 1 April 2011].

[64] See Davidson MJ (1999), *A Guide to Military Criminal Law*, U.S. Naval Institute Press, p.1.

in full conformity with the guarantees of the right to a fair trial under Article 14 of the ICCPR which "…*cannot be limited or modified because of the military or special character of the court concerned*."[65] The HRC has further emphasised that "...trials of civilians by military or special tribunals should be exceptional, i.e. limited to cases where the state party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials."[66] In the recent decision of *Madani v. Algeria*,[67] the HRC emphasised that it is incumbent on a State party that does try civilians before military courts to justify the practice.[68] It stressed that "…the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable."[69]

On the facts of the case, the HRC therefore held that the trial of *Madani* (for jeopardizing State security and smooth operation of the national economy) by a military tribunal, was a violation of Article 14 of the ICCPR since Algeria did not show why recourse to a military court was required and did not indicate why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. It was emphasised that the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences does not constitute an argument under the ICCPR in support of recourse to such tribunals.[70] From the above reasoning of the HRC, as Shah argues, it is plausible to conclude that it has established a principle that as a matter of presumption, the trial of civilians by

[65] HRC General Comment 32 (2007), supra note 2, para.22.

[66] HRC General Comment 32 (2007), ibid. Principle 5 of the Basic Principles on the Independence of the Judiciary states in this regard, inter alia, that "Everyone shall have the right to be tried ordinary courts or tribunals using established procedure." Principle 5 of the UN Principles on Military Justice also emphasises that "Military courts should, in principle, have no jurisdiction to try civilians and that in all circumstances, States must ensure that civilians accused of a criminal offence of any nature are tried by civilian courts."

[67] *Madani v. Algeria*, U.N. Doc. CCPR/C/89/D/1172/2003 (2007).

[68] Ibid, para.8.7. See also *Benhadj v. Algeria*, U.N.Doc. CCPR/C/90/D/1173/2003 (2007), para.8.8.

[69] Ibid.

[70] Ibid.

military tribunals is *per se* a violation of the right to a competent tribunal guaranteed by Article 14 (1) of the ICCPR.[71] It is therefore incumbent on the State whose military tribunals try civilians to rebut this presumption.

From the comparative jurisprudence of the ECrtHR, the Court has held regarding the jurisdiction of military tribunals over civilians under the ECHR, that "While it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated, the existence of such jurisdiction should be subjected to particularly careful scrutiny, since only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6."[72] It emphasised that, "The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so only on a clear and foreseeable legal basis."[73] The existence of such reasons must be substantiated in each specific case.[74] In this respect, the ECrtHR stressed that "It is not sufficient for the national legislation to allocate certain categories of offences to military courts *in abstracto.*"[75]

On its part, the African regional human rights system goes beyond the position of the HRC, the ECrtHR and the UN Principles on Military Justice in dealing with the question of jurisdiction of military tribunals over civilians. The African Commission Principles completely bar military tribunals from trying civilians. Section G of these Principles provides for the right of civilians not to be tried by military courts. It emphasises that "…the only purpose of military courts shall be to determine offences of a purely military nature committed by military personnel" and emphatically states that "*Military courts should not, in any circumstances whatsoever, have jurisdiction over civilians."*[76] This position was affirmed by the ACHPR in *Media Rights Agenda*

[71] See Shah S (2008), "The Human Rights Committee and Military Trial of Civilians: *Madani v. Algeria*," *Human Rights Law Review*, Vol. 8, No.1, p.143.

[72] *Martin v. United Kingdom* (2006) 44 EHRR 31, para.44.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Section G (c). Emphasis added.

(on behalf of Niran Malaolu) v. Nigeria.[77] This means therefore that for countries in Africa like Uganda, party to the African Charter, the trial of civilians by military tribunals is completely forbidden.

This very strong stand of the ACHPR on the question of jurisdiction of military tribunals over civilians is however challengeable in some respects. It contradicts certain existing acceptable practices in international law, in particular, International Humanitarian Law (IHL). As Rowe rightly notes, the Geneva Conventions of 1949 permit trial of civilians by military courts in certain circumstances.[78] For instance, in war time situations, regarding the duties of an Occupying power under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), pursuant to Article 66, in the case of a breach of penal provisions applying to civilians in the occupied territory promulgated by it by virtue of Article 64 (2), the Occupying power may hand over the accused persons to its "*properly constituted, non-political military courts, on condition that the said courts sit in the occupied country*."[79] From this perspective, it is submitted that the better view is that adopted by the HRC as highlighted above i.e. the jurisdiction of military tribunals over civilians should be exceptional and in particular only where the state can prove that with regard to the specific class of individuals, the regular civilian courts are unable to undertake the trials, and that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. It is not enough for the national legislation to allocate certain categories of offences to military courts *in abstracto.*

Concerning the question of jurisdiction over the subject matter, Principle 8 of the UN Principles on Military Justice states that "The jurisdiction of military courts should be limited *to offences of a strictly military nature* committed by military personnel.

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[77] *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, African Commission on Human and Peoples' Rights Comm. No. 224/98 (2000), para.62.

[78] Rowe P (2006), *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press, Cambridge, p.101. See also Gibson MR (2008), "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity," *Journal of International Law and International Relations*, Vol.4, No.1, p.35.

[79] Emphasis added.

Military courts may try persons treated as military personnel *for infractions strictly related to their military status*."[80] In a series of its Concluding Observations on the periodic national reports under Article 40 of the ICCPR, the HRC has increasingly stressed the principle that the jurisdiction of military tribunals should be limited to offences of a strictly military nature. For instance, regarding Cameroon, the HRC was concerned about the extension of the jurisdiction of military courts not only over civilians but also to offences which were not of a military nature per se, for example all offences involving fire arms.[81] It consequently recommended that Cameroon "…should ensure that the jurisdiction of military tribunals is limited to military offences committed by military personnel."[82] Similarly, regarding Guatemala, the HRC noted that "…the wide jurisdiction of military courts to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations."[83] It therefore recommended that Guatemala should "…amend the law to limit the jurisdiction of the military courts to the trial of military personnel who are accused of crimes of an exclusively military nature."[84] In the same way, the ACHPR has noted and emphasised that while in many African countries military courts and special tribunals exist alongside regular judicial institutions, "*the purpose of Military Courts is to determine offences of a pure military nature committed by military personnel*."[85]

An important question regarding the competence of military tribunals in as far as the issue of jurisdiction over the subject matter is concerned is whether or not, military tribunals should have jurisdiction to try military personnel accused of committing gross human rights violations. Although the ICCPR does not have any provisions dealing with this issue, a critical analysis of the jurisprudence of the HRC points to the fact that it generally regards the practice of giving military tribunals jurisdiction to

[80] Emphasis added.

[81] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Cameroon*, 4 November 1999. CCPR/C/79/Add.116, para.21.

[82] Ibid.

[83] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Guatemala*, 27 August 2001. CCPR/CO/72/GTM, para.20.

[84] Ibid.

[85] *Media Rights Agenda v. Nigeria*, supra note 77. Emphasis added.

try military personnel accused of committing human rights violations to be incompatible with the obligations of States under the ICCPR. For instance, in its Concluding observations to Colombia, it stated that "Military courts do not seem to be the most appropriate ones for the protection of citizen's rights in a context where the military itself has violated such rights."[86] It therefore recommended that Colombia should "...limit the competence of military courts to internal issues of discipline and similar matters *so that violations of citizens' rights will fall under the competence of ordinary courts of law*."[87] With respect to Brazil, the HRC expressed concern at the practice of trying military police accused of human rights violations before military courts and regretted that the jurisdiction to deal with those cases had not yet been transferred to the civilian courts.[88] The HRC has also previously recommended to Lebanon to review the jurisdiction of its military courts and transfer their competence, "in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to ordinary courts."[89]

In line with the jurisprudence of the HRC, Principle 9 of the UN Principles on Military Justice also states that "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes." With regard to the question of enforced disappearance, Article 16 (2) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance[90] stipulates that persons responsible for enforced disappearance, either as principal or accessory "...shall be tried only by the competent ordinary courts in each State, *and not by any other special tribunal, in particular*

[86] Human Rights Committee, *UN Human Rights Committee: Concluding Observations, Colombia*, 25 September 1992, CCPR/C/79/Add.2, para.393.

[87] Ibid, para.394. Emphasis added.

[88] Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Brazil*, 24 July 1996, CCPR/C/79/Add.66, para.315.

[89] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Lebanon*, 5 May 1997, CCPR/C/79/Add.78, para.14.

[90] General Assembly resolution 47/133 of 18 December 1992.

military courts."[91] The International Convention for the Protection of All Persons from Enforced Disappearance[92] does not however restrict the jurisdiction of military courts in the above respect. The Convention provides that "any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial tribunal established by law."[93]

An important question that can be asked now is: Why should military courts, even if they fully comply with the guarantees of the right to a fair trial be denied the jurisdiction to try soldiers accused of gross human rights violations? The major reason which in our opinion is legitimate lies in the great need to combat impunity. This reasoning is supported by the context in which the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity[94] restrict the jurisdiction of military courts.[95] According to Principle 29 of these Principles:

> The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, *to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.*[96]

While it is true as writers like Gibson argue, that military courts can be effective tools for ending impunity and that a military court in one state may be much fairer and more competent to try human rights violation related offences than a civilian court in another state,[97] experience from countries like Uganda where military personnel in the

[91] Emphasis added.

[92] International Convention for the Protection of All Persons from Enforced Disappearance, GA Res.61/177, 61st Sess., UN Doc. A/RES/61/177 (20 December 2006) 1 at 5.

[93] Ibid, Article 11 (3).

[94] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, E/CN.4/2005/102/Add.1.

[95] According to the Preamble of these Principles which gives the context in which they were adopted, the UN Human Rights Commission adopted them as guidelines to assist states in developing effective measures for combating impunity.

[96] Emphasis added.

[97] Gibson (2008), supra note 78, pp.40 and 41.

different regimes have violated peoples' human rights with impunity points to the great need to restrict the jurisdiction of military tribunals in the above respect. Even when the military courts may apparently be fully compliant with the right to a fair trial, issues like the general level of professionalism in a particular army, the model of civil-military relations within a particular state and the integrity of Government can have strong bearings on whether they can truly be effective tools to fight impunity.[98] For instance, in an army whose level of professionalism is low, for a number of reasons including the desire to protect the image of the army as an institution, commanding officers may fail (or refuse) to initiate investigations or they may conduct sham investigations that cannot provide good evidence for successful prosecution of soldiers accused of violating human rights. Therefore, even if the courts themselves may be competent, independent and impartial, if cases of human rights violations are not brought to them or are brought to them with poor evidence as a failure of the military authorities to do their work, they cannot do much. In such cases, the deficiencies are not with the military courts but with the entire army as an institution. Therefore, for countries like Uganda with a repeated history of the armed forces violating peoples' human rights with impunity, and whose armed forces professionalism and integrity is still generally questionable, it remains important to restrict the jurisdiction of their military courts as far as trying soldiers accused of committing human rights violations is concerned.[99]

The competence of persons who constitute a tribunal as the second major aspect of the right to a competent tribunal, requires that people who play judicial roles in a tribunal must have the relevant legal training and must be persons of integrity in order to carry out their functions effectively. Principle 10 of the UN Basic Principles on the Independence of the Judiciary thus states that "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law." The African Commission Principles also state that "No person shall be appointed to judicial office unless they have the appropriate training or learning that

[98] See generally Gibson (2008), ibid.

[99] For a thorough discussion and analysis of the question of jurisdiction of military tribunals over military personnel accused of committing gross human rights violations, see Andreu-Guzman F (2004), *Military Jurisdiction and International Law: Military Courts and Gross Human Rights Violations* [Vol.1], International Commission of Jurists, Geneva.

enables them to adequately fulfill their functions."[100] In the same spirit, Principle 13 of the UN Principles on Military Justice provides that "…the persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications." The UN Principles on Military Justice further stress that "…emphasis should be placed on the requirement that judges called upon to sit in military courts should be competent, *having undergone the same legal training as that required of professional judges*."[101] This is important for the fact that, as required in any democratic society, if military tribunals are to dispense justice based on the same standards as civilian courts, then surely the judges of either court must have the same level of understanding and appreciation of the legal rules and procedures.

A key question to pose here is: In the context of military tribunals, does the requirement to have appropriate qualifications in law (legal competence) apply to both the members of the tribunal and the judge advocates? It is submitted that principally, this requirement applies to the judge advocates since (as opposed to the members of the court who are triers of facts) their major role is actually to advise the military courts on issues of law and procedure. Thus in *Cooper v. United Kingdom*,[102] the ECrtHR held that although there was no requirement that ordinary members of court martial should have formal legal training, this was not necessarily inconsistent with Article 6 (1) of the ECHR which protects the right to an independent and impartial tribunal. Referring, inter alia, to the "key role of legally qualified and experienced judge advocate whose directions [on issues of law and procedure] the ordinary members of court would be careful to respect," the Court held that in the

[100] It is worth noting that the African Commission Principles and the UN Basic Principles on the Independence of the Judiciary treat the issue of appropriate training and qualifications as an aspect of the right to an independent tribunal. It is respectfully submitted that while having appropriate training and qualifications is very important for ensuring the independence of tribunals, it is most relevant to the question of ensuring the competence of tribunals. That is why we analyse the issue of appropriate training and qualifications as aspects of the right to a competent tribunal, although we also consider it in the context of the right to an independent and impartial tribunal.

[101] Supra note 54, para.47. Emphasis added.

[102] *Cooper v. United Kingdom* [2003] EHRR 48843/99, para.123.

circumstances, the independence of the ordinary members of court was not undermined by their lack of legal qualifications.[103]

Where however, the military court does not have legally qualified advocates or where the judge advocates do not enjoy sufficient safeguards to guarantee their independence and impartiality or where, as legally qualified persons, they do not play substantial roles in the proceedings and decisions of court, there is always need to fill this gap by requiring that all or some of the members of court be legally competent. Thus in *Media Rights Agenda v. Nigeria*,[104] where the tribunal in question seems not to have had anyone legally competent to advise it on issues of law and procedure, the ACHPR held that "*selection of serving military officers with little or no knowledge of law…"* as members of the special tribunal which tried Niran Malaolu contravened Principle 10 of the UN Basic Principles on the independence of the Judiciary.[105] At the end of it all, the ultimate test is whether a tribunal taken as a whole can be said to be legally competent.

Another important issue that may be asked is whether the legal competence deficiencies of military tribunals can be solved by providing subsequent review mechanisms that establish the compliance of the courts' proceedings with the law. The general principle established by case law jurisprudence from the ECrtHR, is that an accused faced with a criminal charge is entitled to a first-instance court which fully complies with the requirements of the right to a fair trial, and that structural/organizational defects cannot be corrected by any subsequent review procedure.[106]

However, when it comes to legal defects resulting from for example the lack of judge advocates to advise the courts, or, the courts not applying relevant legal principles or applying them wrongly, it may be possible that such defects can be corrected by

[103] Ibid.

[104] Supra note 77, para.60.

[105] Emphasis added.

[106] See for instance, *Thompson v. United Kingdom*, Application no.36256/97, Judgment of 2004, para.46, *Coyne v. United Kingdom*, (124/1996/743/942), Judgment of 24 September 1997, para.57 and *Moore and Gordon v. the United Kingdom*, Application nos. 36529/97 and 37393/97), Judgment of 29 September 1999, para.22.

subsequent review mechanisms. In *De Cubber v. Belgium*,[107] quoting the case of *Adolf v. Austria*,[108] in which it held that the Austrian Supreme Court had "cleared…of any finding of guilt" an applicant in respect of whom a district court had not respected the guarantee of presumption of innocence provided for in Article 6 of the ECHR, the ECrtHR held that "The possibility certainly exists that a higher or highest court might, in some circumstances, make reparation for an initial violation of one of the provisions of the Convention."[109] On the facts of the case, the Court held however, that since the defect in question did not bear solely upon the conduct of the first-instance proceedings, its source being the very composition of the court in issue, the Court of Appeal did not cure it since it did not quash on that ground the judgment in question in its entirety.[110]

For a subsequent review to correct the legal competency deficiencies of a court, the review must be made by a judicial body,[111] or in the event that it is not a judicial body, the final decision must rest with a judicial body which meets the requirements of a fair trial.[112] Unfortunately, as this Chapter firmly establishes, Uganda's appellate military courts (including the top most), which would be expected to correct the legal competence deficiencies of the lower courts, do not meet the requirements of a fair trial. Moreover, except in cases involving death or imprisonment for life, no appeal is allowed from the military courts to the civilian courts.

In sum, it is clear that the right to a competent tribunal under international human rights law requires that tribunals must not only have jurisdiction over the subject matter and the persons they try, but also that they should be legally competent. With respect to the question of the jurisdiction of military tribunals over civilians, the general rule is that military courts should not have the power to try civilians. With exception to Section G (c) of the African Commission Principles which proposes an absolute rule in that regard, this rule is only subject to a situation where a state can

[107] *De Cubber v. Belgium*, Application no. 9186/80, Judgment of 26 October 1984.

[108] *Adolf v. Austria*, Application no.8269/78, Judgment of 26 March 1982.

[109] Supra note 107, para.33.

[110] Ibid.

[111] This is because as an important aspect of the right to an independent tribunal, decisions of court cannot be varied by a non-judicial establishment.

[112] *Cooper v. United Kingdom*, supra note 102, paras.130 and 131.

show that resorting to trial of civilians in military courts is necessary and justified by objective and serious reasons. The State that seeks to try civilians in military courts must demonstrate with regard to the specific class of individuals and offences at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high security civilian courts are inadequate to the task and that recourse to the military tribunals is unavoidable. These exceptions must necessarily be restrictively interpreted and in all cases, the trial of civilians before military tribunals should be in full conformity of the guarantees of the right to a fair trial. It is also the position in international human rights law that military courts are not generally considered competent tribunals for trying military personnel accused of committing gross human rights violations.

2.3.2. The Right to an Independent Tribunal

Perhaps the most important guarantee of the right to a fair trial is the right to an independent tribunal. The right to an independent tribunal is guaranteed by both the UDHR and the ICCPR.[113] Although the African Charter does not explicitly provide for the right to an independent tribunal, Article 26 of the Charter imposes an obligation on states party to ensure that their courts are independent. Following on the above treaty provisions, Principle 1 of the UN Basic Principles on the Independence of the Judiciary states that "…the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." Together with the right to an impartial tribunal, the right to an independent tribunal is possibly the most important canon in the administration of justice in any democratic society. It is a major pre-requisite for access to justice; without which, justice remains illusory. Only an independent tribunal is able to render justice impartially on the basis of law.[114] Also, along with the right to a competent and impartial tribunal, the right to an independent tribunal is an absolute right; meaning

[113] Articles 10 and 14 (1) respectively.

[114] Office of the High Commissioner for Human Rights (2003), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, p.115.

that it is not subject to any exceptions.[115] It is therefore a right which applies in all circumstances.

What then are the essential attributes of this important right? Although the notions of "independence" and "impartiality" are closely linked, it is still possible to identify the major elements of each. It is clear from existing jurisprudence that the notion of independence of a tribunal involves individual and institutional aspects. The requirement of institutional independence is the embodiment of the important and much cherished doctrine of separation of powers which requires that in order to prevent and mitigate abuses of state power; the three arms of Government (viz., the executive, legislature and the judiciary) must constitute a system of checks and balances.[116] In this regard, the HRC has emphasised that the requirement of independence of a tribunal refers, inter alia, to "…the actual independence of the judiciary from political interference by the executive branch and the legislature."[117]

Principle 1 of the UN Principles on Military Justice also states in this regard that 'Military tribunals, when they exist, may be established only by the constitution or the law, *respecting the principle of the separation of powers.*"[118] Thus in *Olo Bahamonde v. Equatorial Guinea*,[119] where it was alleged that the President of Equatorial Guinea controls the judiciary, the HRC held that "…a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal within the meaning of Article 14 (1) of the Covenant."[120]

[115] HRC General Comment 32 (2007), supra note 2, para.19.

[116] In its original conception, Montesquieu the French philosopher and jurist argued that, "[t]here is no liberty, if the judiciary power be not separate from the legislature and the executive. Were it joined with the legislature, the life and liberty of the subjects would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression." See Montesquieu (1748), De L'Esprit des Lois, Book IX, Chapter 6. Whitefish, Kessinger Publishing.

[117] HRC General Comment 32 (2007), supra note 2, para.19.

[118] Emphasis added.

[119] U.N. Doc. CCPR/C/49/D/468/1991 (1993).

[120] Ibid, para.9.4.

The basic principle upon which both the institutional and individual independence of military tribunals can be ensured in the administration of military justice is that military judges and other critical staff in the military justice system like the members of military courts should have a status guaranteeing their independence in particular vis-à-vis the military hierarchy and command.[121] This is very important because it is a cardinal rule in the military that lower rank soldiers must obey orders and instructions from their superiors. If this rule were to apply to members of military courts and other officers of the military justice system in their conduct of judicial business, then surely military justice would be a mockery of justice. Although it is appreciated that the idea of a separate system of military justice requires some relations between the military hierarchy (and therefore the executive) and the military judicial system,[122] members of military courts and other officers of the military justice system like the judge advocates should never act as agents of the military leadership or the executive.

The principle of institutional independence requires that military tribunals must be free from interference especially from the executive and the military hierarchical command with respect to matters that relate to their judicial function. They must not only be self-governing as regards their administrative and operational matters but in line with Principle 3 of the UN Basic Principles on the Independence of the Judiciary, they must also be independent in their decision-making. Government authorities, in particular the executive and the military leadership must, in keeping with Principle 1 of the UN Basic Principles on the Independence of the Judiciary, observe and respect the independence and decisions of military tribunals. In conformity with Principle 4 of the UN Basic Principles on the Independence of the Judiciary; decisions of military tribunals should also never be subjected to revision by a non-judicial establishment. In *Morris v. United Kingdom,*[123] the ECrtHR emphasised the point that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of a "tribunal." It held that the principle is also a component of the right to an independent tribunal as required by Article 6 (1) of the ECHR. In *Findlay v. United Kingdom,*[124] the role played by the convening officer of the court martial as

[121] Principle 13 of the UN Principles on Military Justice, supra note 54.

[122] *R v. Genereux* [1992] 1 S.C.R. 259, p.308.

[123] In *Morris v. United Kingdom* (2002) 34 EHRR 52, para.73.

[124] *Findlay v. United Kingdom* (1997) 24 EHRR 211, para.77.

"confirming officer" of the decisions of court was found to be contrary to this well-established principle.

Another critical aspect for ensuring the institutional independence of military tribunals is that the authority that appoints members of the tribunal must not be the same to appoint the prosecutor. In *R v. Genereux*[125] where this was the case, while observing that the convening authority of the General Court Martial was an integral part of the military hierarchy and therefore of the Executive, Lord Lamer C.J delivering the judgment of the Supreme Court of Canada held that "…it is not acceptable that the convening authority, i.e. the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as triers of fact."[126] He emphasised that "…at the minimum… where the same representative of the executive, the 'convening authority,' appoints both the prosecutor and the triers of fact, the requirements of s. 11 (d) will not be met."[127] Similarly, in *Findlay v. the United Kingdom*,[128] the ECrtHR was concerned among other things that the convening officer of the court martial who appointed its members, also appointed the prosecuting officers. It therefore held that in light of the central role played by the convening officer (which included appointing both the members of the court and the prosecutor); Findlay's misgivings about the independence and impartiality of the tribunal were objectively justified.[129]

Related to the question of appointment of the prosecutors, is that it is also an essential requirement for ensuring the institutional independence of military tribunals that persons who preside as judge advocates must be appointed by an independent establishment. In *R v. Genereux*, while holding that the appointment of the Judge advocate by the Judge Advocate General undermined the institutional independence of the General Court Martial, Lord Lamer C.J observed that "…the close ties between the Judge Advocate General, who is appointed by the Governor in Council, and the

[125] Supra note 122.

[126] Ibid, p.309.

[127] Ibid. Section 11 (d) of the Canadian Charter of Rights and Freedoms provides for the right to an independent tribunal among other things.

[128] Supra note 124, para.74.

[129] Ibid, para.80.

Executive, is obvious."[130] He emphasised that the effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence of the tribunal.[131] He stressed that in order to comply with Section 11 (d) of the Canadian Charter of Rights and Freedoms, the appointment of a military personnel to sit as a judge advocate at a military tribunal should be in the hands of an independent and impartial judicial officer.[132]

Like with civilian judges, the three factors considered key for ensuring the individual independence of military judges are: the manner of appointment, security of tenure and financial security. In this regard, the HRC has emphasised that "…the requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure... the conditions governing promotion, transfer, suspension and cessation of their functions."[133] The HRC has further stressed that "…states should take specific measures …protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary, and disciplinary sanctions against them."[134] Principle 11 of the UN Basic Principles on the Independence of the Judiciary also requires that "...the term of office of judges... adequate remuneration and conditions of service, pensions and the age of retirement shall be adequately secured by law." According to the ECrtHR jurisprudence, in order to establish whether a tribunal can be considered independent, within the meaning of the ECHR, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.[135]

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[130] Supra note 122, p.309.

[131] Ibid.

[132] Ibid.

[133] HRC General Comment 32 (2007), supra note 2, para.19.

[134] Ibid.

[135] See *Morris v. the United Kingdom*, supra note 123, para.58 and *Findlay v. the United Kingdom*, supra note 124, para.73. See also, *Bryan v. the United Kingdom*, judgment of 22 November 1995, Series A no. 335-A, p.15, para.37.

Regarding the manner of appointment of persons to judicial office, two points must be emphasised. First, the method of judicial selection must safeguard against judicial appointments for improper motives and must ensure that only individuals of integrity and ability with appropriate training are appointed.[136] Thus, as part of the elements necessary to ensure independence of tribunals, Section A (1) (i) of the African Commission Principles also stresses, inter alia, that "The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability." Principle 13 of the UN Principles on Military Justice states, inter alia, that "…the persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications." In *Media Rights Agenda v. Nigeria,*[137] the ACHPR held that the selection of serving military officers, with little or no knowledge of law as members of the special military tribunal that tried Malaolu was in contravention of Principle 10 of the UN Basic Principles on the Independence of the Judiciary.

It is worth observing in the above regard that in addition to the issue of appropriate training and qualifications being critical for ensuring the competence of tribunals as discussed in Section 2.3.1 above, the UN Basic Principles on the Independence of the Judiciary, the African Commission Principles, and the UN Principles on Military Justice consider it also as a key aspect in ensuring the right to an independent tribunal. This is presumably because it is assumed that through the relevant training, persons appointed to judicial office are able to understand and appreciate the need to ensure and uphold the independence of tribunals. This reasoning is reinforced by the African Commission Principles which require states to ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law. Thus, in *Amnesty International and Others v. Sudan,*[138] the ACHPR held that the dismissal of over 100 judicial officers by the Sudanese government deprived the courts of qualified

[136] See Principle 10 of the UN Basic Principles on the Independence of the Judiciary, supra note 51.

[137] Supra note 77, para.60.

[138] Supra note 21, para.69.

personnel required to ensure their independence and impartiality. The UN Principles on Military Justice make the point even more clear. It is explicitly stated that "The legal competence and ethical standards of military judges, as judges who are fully aware of their duties and responsibilities, form an intrinsic part of their independence and impartiality."[139]

Second, the appointment of military personnel to judicial office must ensure their protection vis-à-vis the military hierarchy, avoiding any direct or indirect subordination, whether in the organisation and operation of the military justice system itself or in terms of career development.[140] In *Incal v. Turkey,*[141] the ECrtHR held that among the issues that made the Izmir National Security Court's independence questionable was the fact that it was comprised of servicemen who still belonged to the army, which in turn took orders from the executive. The Court was concerned that such members remained subject to military discipline and that assessment reports were compiled on them by the army for that purpose.[142] Similarly, in *Findlay v. United Kingdom,*[143] while assessing whether the members of the court-martial in question were sufficiently independent of the convening officer; the ECrtHR noted that all of them were subordinate to him in rank. Pointing out that in order to maintain the confidence in the independence and impartiality of the court, appearances are important, it held that since all the members of the court martial which decided Findlay's case were subordinate in rank to the convening officer, Findlay's doubts about the tribunal's independence and impartiality were objectively justified.[144]

The essence of security of tenure as an important aspect in securing the individual independence of judges is that their tenure must be secured against interference by the Executive or other appointing authority in a discretionary or arbitrary manner. Principle 12 of the UN Basic Principles on the Independence of the Judiciary accordingly provides that "…judges whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of

[139] Supra note 54, para.47.

[140] Ibid, para.46.

[141] *Incal v. Turkey* (2000) 29 EHRR 449, para.68.

[142] Ibid.

[143] Supra note 124, para.75.

[144] Ibid, para.76.

office, where such exists." In *Valente v. Queen*,[145] the Supreme Court of Canada held, regarding a legislative provision to the effect that a provincial court judge could hold office under a post-retirement reappointment at the pleasure of the executive, that such judge would not be independent within the meaning of Section 11 (d) of the Canadian Charter of Rights and Freedoms.

An important aspect of guaranteeing security of tenure is that once appointed or elected judge, one should only be dismissed on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.[146] The judge affected must be afforded a full opportunity to be heard. Thus the dismissal of judges by the executive before expiry of the term for which they had been appointed, without any specific reason given to them was held to be incompatible with the independence of the judiciary.[147] In *Mundyo Busyo et al v. Democratic Republic of Congo*,[148] where 315 judges were dismissed by the President without following established procedures (which required that such dismissals could only be legal if they were in response to a proposal by the Supreme Council of the Judiciary), the HRC held that the dismissals constituted an attack on the independence of the judiciary protected by Article 14, paragraph 1, of the ICCPR. Similarly, in its Concluding Observations on the 1996 Zambia periodic report under Article 40 of the ICCPR, the HRC was concerned about the President's power to remove the judges without any independent judicial oversight.[149] Also, in its Concluding Observations on Algeria's 1998 periodic report, the HRC expressed concern over the fact that "…judges enjoy immovability only after 10 years of work."[150]

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[145] *Valente v. Queen* [1985] 2 S.C.R. 673, p.703.

[146] HRC General Comment 32 (2007), supra note 2, para.20.

[147] *Mikhail Ivanovich Pastukhov v. Belarus*, U.N. Doc. CCPR/C/78/D/814/1998 (2003), para.7.3.

[148] U.N. Doc. CCPR/C/78/D/933/2000 (2003), para.5.2.

[149] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Zambia*, 3 April 1996. CCPR/C/79/Add.62, para.16. See also Joseph M, Schultz J and Castan M (2004), *The International Covenant on Civil and Political Rights: Cases, Material and Commentary*, Oxford University Press, Oxford, p.404.

[150] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Algeria*, 18 August 1998. CCPR/C/79/Add.95, para.14.

A key factor in ensuring security of tenure is the duration of the term of office of the judges. The HRC has previously noted that "…the election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality."[151] Similarly, the UN Special Rapporteur on the independence of the judges and lawyers has argued that while "fixed term contracts may not be objectionable and not inconsistent with the principle of judicial independence, a term of five years is too short for security of tenure."[152] In his view, a reasonable term would be 10 years.[153] In *Incal v. Turkey*, where the major complaint was that the Izmir National Security Court which comprised of military judges was not independent, the ECrtHR held that among the aspects that made the independence of those judges questionable, was that their term of office was only four years and subject to renewal.[154]

The final major essential condition for ensuring independence of judges is the issue of financial security. As was well explained by the Supreme Court of Canada, the essence of financial security as an essential condition for securing the independence of a tribunal is that "the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence."[155] In *R v. Genereux*,[156] it was held that the requirement of financial security will not be satisfied if the executive is in position to reward or punish the conduct of members of the military tribunal and the judge advocate by granting or withholding benefits in form of promotions and salary increases or bonuses. Salaries, allowances, pensions and other remunerations and benefits of military judges like their civilian counter-parts must not therefore depend on the grace or favour of the executive or the military hierarchy. As required by Principle 11 of the

[151] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Armenia*, 19 November 1998. CCPR/C/79/Add.100, para.8. For comparative jurisprudence from the ECrtHR regarding the term of office as an important aspect of security of tenure, see Trechsel (2005), supra note 41, p.55. Criticising the ECrtHR for accepting a three year term as compatible with the ECHR (in *Stremek v. Austria),* without giving reasons, Trechsel argues that such a tenure is excessively low.

[152] Report on the Mission to Guatemala, UN doc. E/CN.4/2000/61/Add.1, para.169 (c).

[153] Ibid.

[154] Supra note 141.

[155] Supra note 145, p.704.

[156] Supra note 122, p.305.

Basic Principles on the Independence of the Judiciary, they must be adequately secured by law. They must be secured in a way that does not allow the executive or its representative to influence or manipulate the judges.

As we come to the conclusion of the analysis in this Section about the right to an independent tribunal, an important question that must be asked is: With all the above factors in mind, what constitutes the legitimate test for determining the independence of a particular tribunal? In a passage that accords well with international human rights law, this was succinctly stated by Lamer C.J as follows:

> …an individual who wishes to challenge the independence of a tribunal…. need not prove an actual lack of independence. Instead, the test for this purpose is the same as the test for determining whether a decision maker is biased. The question is whether an informed and reasonable person would perceive the tribunal as independent…. The perception must; however… be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.[157]

The test stated above by Justice Lamer is in essence the same as that applied by the ECrtHR and other international and regional human rights supervisory bodies. The ECrtHR has for instance held in a wealth of decisions that "in determining whether there is a legitimate reason to fear that a particular tribunal lacks independence or impartiality, the stand point of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified."[158]

One last important question to ask here is: In the context of military tribunals, do all the requirements of independence of tribunals apply to the members of the tribunal as they do to the judge advocates? In *Cooper v. United Kingdom*[159] where the ECrtHR was, inter alia, faced with the issue of whether the lack of legal qualifications by members of court martial was inconsistent with the right to an independent and impartial tribunal, the Court held that the general principles established in its case law regarding the independence and impartiality of tribunals apply to both the lay judges

[157] Supra note 122, p.286. See also Rowe (2006), supra note 78, p.83.

[158] See for instance, *Incal v. Turkey*, supra note 141, para.71, and *Gunes v. Turkey* (Application no. 31893/96), Judgement of 25 September 2001, para.46.

[159] *Cooper v. United Kingdom*, supra note 102, para.123.

and professional judges. In *Holm v. Sweden,*[160] the Court explicitly stated that the principles established in its case law regarding the independence and impartiality of tribunals "apply to *jurors* as they do to professional judges and *lay judges*"[161]

The major principle which the ECrtHR has established regarding the independence of tribunals is that in order to establish whether a tribunal can be considered as independent, regard must be had, inter alia, "to the manner of appointment of *its members* and *their* term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."[162] From this perspective, it is tenable to conclude that the general rule is that all the requirements of independence of tribunals apply to the members of military courts as they do to the judge advocates. This is important because both the judge advocates and the members of court are decision-makers and they therefore need to be independent. While the judge advocate rules on issues of law and procedure, based on the judge advocate's rulings, the members of court decide the innocence of the accused and sentence, if found guilty.

However, since at the end of it all, the ultimate test for determining compliance of a tribunal with the right to an independent tribunal is to establish whether taken as a whole, a tribunal can be said to be independent, then depending on the organisation of a particular country's military justice system and the safeguards of independence it provides to the different players, the guarantees for securing independence of judicial officers like security of tenure and financial security may not have to apply equally (or) to all players in the system. For instance, with respect to the issue of security of tenure, the general position taken by the ECrtHR and the House of Lords is that the members of military courts like the jurors in the civil courts do not necessarily require security of tenure to guarantee their independence. Thus, in *Cooper v. United Kingdom,*[163] while noting the ad hoc nature of the appointment of the ordinary members of the court martial (in that they return to ordinary service immediately after the court-martial), the court held that such tenure does not in itself undermine their

[160] *Holm v. Sweden,* Judgment of 25 November 1993, Series A no. 279-A, p. 14, para.30.

[161] Emphasis added.

[162] Supra note 158. Emphasis added.

[163] Supra note 102, para.120.

independence but points to the need for strong safeguards against outside pressure being brought to bear on them. The Court found, inter alia, the protection offered by the permanent president of court martial (who enjoyed significant safeguards for independence including *defacto* security of tenure), the role of legally qualified and experienced judge advocates whose directions the ordinary members would have to respect, and the fact that the ordinary members of court could not be reported on in relation to their judicial function to constitute sufficient safeguards of the independence for the ordinary members of court.[164] In *Regina v. Boyd*,[165] while referring to the ECrtHR case of *Morris v. United Kingdom*, the House of Lords put it clearly that:

> It is true that, apart from any permanent president, the officers selected to serve on courts-martial are appointed only ad hoc…that is not in itself sufficient to make the court incompatible with the independence requirements of article 6 (1)…In the light of their experience of jury trial, however, courts in countries which operate with juries have concluded that the safeguards of the oath and the judge's directions are generally sufficient to ensure that jurors put aside their prejudices and reach a just verdict on the evidence…The European Court too has recognised that the jurors' oath, to faithfully try the case and to give a true verdict according to the evidence, and their obligation to have regard to the directions given by the presiding judge will generally be sufficient to safeguard their independence and impartiality. This is so even in cases where there is reason to believe that one or more members of the jury may actually be prejudiced against the accused.[166]

Although the ECrtHR and the House of Lords have good reasons for taking the above-mentioned general position, it is submitted that where for instance, the safeguards offered by a particular military justice system may not be adequate to secure the independence and impartiality of the judge advocates, and where the role of the judge advocates in the proceedings and decisions of court is not significant, the issue of security of tenure of the members of military courts or the presidents of those courts becomes important. This is especially because, at the end of it all, the question will be whether taken as a whole, a tribunal can be said to be independent.

In conclusion, it can be summarised that the right to an independent tribunal as guaranteed by international human rights law comprises two aspects i.e. institutional

[164] Ibid, paras. 121-125.

[165] *Regina v. Boyd* [2002] UKHL 31.

[166] Ibid, para.67.

independence of a tribunal and the individual independence of the members of the tribunal. The notion of institutional independence requires that the tribunal must be independent especially from the executive as required by the doctrine of separation of powers. In the context of military justice where the top military hierarchy is the apex of executive representation, this means that military tribunals must be independent from the executive and the military hierarchical command. Military tribunals must not only be self-governing as regards their operations and administrative issues but must also be independent in their decision making. Government authorities, in particular the executive and the military hierarchy must not interfere with the operations of military tribunals and must respect their decisions. Decisions of military tribunals should never be made subject to review by non-judicial establishments. Prosecutors and the military judges should never be appointed by the same authority that appoints the members of the military tribunals. They must be appointed by an independent establishment. Needless to emphasise, they must be persons of integrity with relevant qualifications.

Individual independence on the other hand requires that only individuals of integrity and ability with appropriate legal training and qualifications must be appointed judges in military tribunals. It also entails protecting the members of military courts and military judges' independence vis-à-vis the military hierarchical command and in particular avoiding subordination both in the organisation of the military justice system itself and in terms of career development. Finally, it requires that the tenure and financial benefits and entitlements of the military judges and members of military courts should be secured against the discretionary or arbitrary interference by the executive, military hierarchy or any other appointing authority.

2.3.3. The Right to an Impartial Tribunal

Closely related to the right to an independent tribunal, is the right to an impartial tribunal. The right to an impartial tribunal is protected as part and parcel of the right to a fair trial by both the UDHR and the ICCPR.[167] It is also guaranteed by Article 7 (1) (d) of the African Charter. Principle 2 of the UN Basic Principles on the Independence of the Judiciary also stipulates that "…the judiciary shall decide matters

[167] Articles 10 and 14(1) respectively.

before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." The right to an impartial tribunal is arguably the most important guarantee for ensuring a fair trial. For an individual who is party to judicial proceedings, it is more likely that impartiality of the tribunal matters more than any other fair trial guarantees. To such a person, as Trechsel rightly argues, it may not matter much that a tribunal is incompetent and not independent, as long as its impartiality is guaranteed.[168] If however the tribunal is not impartial, however independent and competent it may be, "its very basis and role as a neutral arbiter in the adjudication of cases is distorted and public confidence in the judicial system is greatly undermined."[169] It is indeed plausible to argue in the above respect that a tribunal which is not impartial is not a tribunal at all. This is essentially because the requirement of impartiality is inherent in the very concept of a tribunal.

The requirement for impartiality of a tribunal has two aspects. First, the tribunal must be subjectively free of personal bias. The HRC has thus stated that the judges must not allow their judgments to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.[170] As Trechsel put it, "The judge must be free to float hither and thither between the positions of the parties and finally reach a decision at the place which, in correct application of the rules of jurisprudence, marks the just solution."[171]

Secondly, the tribunal must also appear to reasonable observers to be impartial.[172] This requirement is the embodiment of the old but still very important principle in the administration of justice that "justice must not only be done, but should manifestly

[168] Trechsel (2005), supra note 41, p.50.

[169] Office of Democracy and Governance (2002), *Guidance for Promoting Judicial Independence and Impartiality*, United States Agency for International Development, Washington, p.6. See also Trechsel (2005), supra note 41, p.50.

[170] HRC General Comment 32 (2007), supra note 2, para.21. See also *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989 (1992), para.7.2.

[171] Trechsel (2005), supra note 41, p.50.

[172] HRC General Comment 32 (2007), supra note 2, para.21.

and undoubtedly be seen to be done."[173] This requirement is very important for instilling public confidence in the ability of the tribunal to execute its functions in a neutral manner. The ECrtHR has emphasised that the appearance of a tribunal is important because "what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings."[174] Similarly, the Supreme Court of Canada has also stressed that "both the independence and impartiality of a tribunal are fundamental not only to the capacity of court to do justice but also to individual and public confidence in the administration of justice; without which the tribunal cannot command the respect and acceptance that are essential to its effective operation."[175] In *Constitutional Rights Project (in respect of Wahab Akamu, Gbolahan Adeaga and others) v. Nigeria,*[176] where the ACHPR was faced with the issue of a special tribunal which consisted of one retired judge, one member of the armed forces and one member of the police force, while observing that the tribunal was composed of persons belonging largely to the executive branch of Government, the same branch that passed the Robbery and Firearms Decree, it held that "…regardless of the character of the individual members of such tribunal, *its composition alone creates the appearance, if not actual lack, of impartiality*."[177] As a result, the ACHPR held that the tribunal in question violated Article 7 (1) (d) of the African Charter which guarantees the right to an impartial tribunal.[178]

It is largely for this requirement, i.e. that the tribunal must appear to reasonable persons to be impartial, that international human rights law bars military and special tribunals with "faceless judges."[179] This is so even if the identity and status of such

[173] Dictum by Lord Hewart, C.J. in *R v. Sussex Justices ex parte McCarthy* (1924) 1 KB 256, p.259.

[174] See *Daktaras v. Lithuania*, Judgment of 10 October 2000, para.32.

[175] See *Valente v. The Queen*, supra note 145, p.689.

[176] *Constitutional Rights Project (in respect of Wahab Akamu, Gbolahan Adeaga and others) v. Nigeria,* African Commission on Human and Peoples' Rights, Communication No. 60/91 (1995).

[177] Ibid, para.14. Emphasis added.

[178] Ibid. See also *Amnesty International and Others v. Sudan*, supra note 21, para.61.

[179] HRC General Comment 32 (2007), supra note 2, para.23. See also the UN Principles on Military Justice, supra note 54, para.48.

judges is verified by an independent authority.[180] In *Polay Campos v. Peru*,[181] where the tribunal in issue was composed of "faceless judges," the HRC stated that trials by special tribunals composed of anonymous judges are incompatible with Article 14 of the ICCPR. It argued that in such a situation, "the defendants do not know who the judges trying them are and unacceptable impediments are created to their preparation of their defence and communication with their lawyers. *Moreover, this system fails to guarantee a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant: that the tribunal must be, and be seen to be, independent and impartial*. In a system of trial by 'faceless judges', *neither the independence nor the impartiality of the judges is guaranteed*, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces."[182] The HRC therefore held that the tribunal in issue breached the requirement for impartiality and independence of tribunals among other breaches of the ICCPR.

With specific regard to military judges, the international community generally recognises that the concept of impartiality is a complex one. It acknowledges that parties to proceedings before military tribunals have good reasons to view the military judge as an officer who is capable of being "a judge in his own cause" in any case involving the armed forces as an institution, rather than a specialist judge on the same footing as any other.[183] That is why it is critical that everything should be done to minimise any doubts as to the impartiality of the military judges and therefore of the tribunals over which they preside. It is submitted in this regard that guaranteeing the independence and competence of military judges as discussed above are strong factors in themselves that can help in this respect. The presence of civilian judges in the composition of military tribunals is also an important factor that can help reinforce the impartiality of military tribunals.[184]

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[180] Ibid. Usually, the resort to such tribunals with "faceless judges" and at times "faceless prosecutors" is justified by states on the need to guarantee the security of judges and prosecutors in the wake of terrorism and when dealing with cases involving dangerous criminals.

[181] *Polay Campos v. Peru*, U.N. Doc. CCPR/C/61/D/577/1994 (1997), para.8.8. See also *Gutierrez Vivanco v. Peru*, U.N. Doc. CCPR/C/74/D/678/1996 (2002), para.7.1.

[182] Ibid. Emphasis added.

[183] UN Principles on Military Justice, supra note 54, para.46.

[184] Ibid.

2.3.4. The Right to a Public Hearing

Another yet essential guarantee of the right to a fair trial protected by international human rights law is the right to a public hearing. The right to a public hearing is protected by both the UDHR and the ICCPR.[185] Although the African Charter does not provide specifically for the right to a public hearing, Section A (1) of the African Commission Principles states, inter alia, that "…in the determination of any criminal charge against a person, or of his rights and obligations… everyone shall be entitled to… a public hearing…" In view of the fact that the African Charter does not specifically provide for the right to a public hearing, the approach adopted by the ACHPR has been to treat it as part and parcel of the general right to a fair hearing protected by Article 7 of the African Charter. For instance, in *Civil Liberties Organisation et al v. Nigeria* where it was alleged that except for the opening and closing ceremonies, the trial in issue was conducted in camera, the ACHPR held that that was "… a violation of the victims' right to a fair hearing guaranteed under Article 7 of the Charter."[186] In *Media Rights Agenda v. Nigeria*,[187] the ACHPR invoked Articles 60 and 61 of the African Charter which empowers it to draw inspiration from international human rights law and other specific and general conventions, and found Nigeria, inter alia, to be "...in violation of the victim's right to fair trial guaranteed under Article 7 of the Charter."[188]

Principle 14 of the UN Principles on Military Justice, emphasises with respect to proceedings before military tribunals, that as "…in matters of ordinary law, public hearings must be the rule, and the holding of sessions in camera should be altogether exceptional and be authorised by a specific, well-grounded decision the legality of which is subject to review." Subjecting the decisions of military tribunals to hold proceedings in camera to review is a welcome and important safeguard for the right to a public hearing in the administration of military justice. It enables the grounds for refusal to hold a public trial to be verified and thus ensures that the right to a public

[185] See Articles 10 and 14 (1) respectively.

[186] Supra note 8, para.39.

[187] Supra note 77.

[188] Ibid, paras.51 and 54. ." It is notable that in these two cases, the ACHPR used the words "fair hearing" and "fair trial" interchangeably. Does this imply that the two mean the same thing? Section 2.3.5 of this thesis, explores, inter alia, the relationship between these two concepts.

hearing is not denied on frivolous grounds. It is however submitted that in order to be effective, the review should be by an independent judicial establishment preferably the civilian courts.

The major importance of the requirement to make hearings public is that it ensures that the cardinal principle in the administration of justice that "justice must not only be done, but should also manifestly and undoubtedly be seen to be done" is fulfilled. As Lord Atkin argued, "Justice is not a cloistered virtue."[189] In this regard, parties to the proceedings and the general public have the right to know and confirm how justice is administered. Article 9 (3) (b) of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders)[190] provides that "…everyone has the right, individually and in association with others, *inter alia*: to attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments." Thus in *Civil Liberties Organisation, et al v. Nigeria*, while emphasising that Article 14 of ICCPR requires that the trial should guarantee the right of the accused person to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him, the ACHPR held that "…where the trial is held in camera, there can be no independent demonstration that these requirements have been met.[191]

In the above regard, the requirement to make judicial proceedings public is therefore increasingly seen as a method of ensuring the accountability of judicial officers within a democratic society.[192] It is argued that "a judge is bound to be more fair and

[189] *Ambard v. Attorney-General for Trinidard and Tobago* [1936] A.C. 322, p.335.

[190] Adopted at the Fifty-third session of the UN General Assembly, 8 March 1999, A/RES/53/144. Available at: http://www.unhcr.org/refworld/docid/3b00f54c14.html [Accessed 1 April 2011].

[191] *Civil Liberties Organisation, et al v. Nigeria*, supra note 8, para.38.

[192] Leigh I (1996), "Secret Proceedings in Canada," *Osgoode Hall Law Journal*, Vol.34, No.1, p.116. As Lord Bowen emphasised in *Leeson v. The General Medical Council* (1889) 59 LJChNS 233, p.241, "… judges, like Caesar's wife, should be above suspicion."

circumspect while trying a case and delivering judgement in public than when the proceedings are held in secrecy."[193] In the words of Jurist Bentham:

> In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest guard against improbity. It keeps the judge himself while trying under trial.[194]

Even if a secret trial is in fact otherwise fair, as Iheme rightly argues, the mere fact that it was done in secret is enough to create misgivings in the minds of members of public.[195] From this perspective, publicity of judicial proceedings therefore also helps to instil and maintain public confidence in court processes without which; courts cannot command the respect and acceptance - aspects that are vital for their effective administration of justice in any democratic society. Thus in *Axen v. Germany*, while stressing the importance of the right to a public hearing under the ECHR, the ECrtHR affirmed that "…the public character of the proceedings…protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."[196]

In terms of its application, it has been affirmed that the requirement of a public hearing does not necessarily apply to all appellate proceedings.[197] These proceedings may therefore take place on the basis of written submissions. The right to a public hearing does not also necessarily apply to the pre-trial decisions made by prosecutors

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[193] Iheme E (1999), *Military Tribunals and Due Process in Nigeria*, Constitutional Rights Project, Lagos, p.21.

[194] See Bentham J (1827), *Rationale of Judicial Evidence*, Vol.1, Hunt & Clerke, London, c.10, cited by Dickson J in *Nova Scotia (A.G) v. MacIntyre* [1982] 1 S.C.R. 175, pp.183-84.

[195] Iheme (1999), supra note 193.

[196] *Axen v. Germany* (1984) 6 EHRR 195, para.25.

[197] HRC General Comment 32 (2007), supra note 2, para.28. See also *R.M. v. Finland*, Communication No. 301/1988(1989), para.6.4.

and other public authorities.[198] Thus in *Kavanagh v. Ireland* where the author of the communication contended that his right to a public hearing was violated because he was not heard by the Director of Public Prosecutions (DPP) on the decision to convene a special criminal court, the HRC held that the right to a public hearing does not apply to pre-trial decisions made by prosecutors and public authorities.[199] But for the proceedings to which the right to a public hearing applies, how is it to be realised in actual practice? In *G. A. Van Meurs v. The Netherlands,* the HRC held that "courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made."[200]

According to Section A of the African Commission Principles**,** the essential elements of the right to a public hearing require, inter alia that: (a) All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body; (b) A permanent venue for proceedings by judicial bodies shall be established by the State and widely publicised. In the case of ad-hoc judicial bodies, the venue designated for the duration of their proceedings should be made public; (c) Adequate facilities shall be provided for attendance by interested members of the public; (d) No limitations shall be placed by the judicial body on the category of people allowed to attend its hearings where the merits of a case are being examined; and (e) Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings.

The HRC has emphasised that the requirement for public hearing is a duty imposed on the state and does not depend on request by the parties to the proceedings.[201] It is therefore a requirement that where a tribunal decides to hold the proceedings in secret,

[198] HRC General Comment 32 (2007), ibid.

[199] *Kavanagh v. Ireland*, U.N. Doc. CCPR/C/71/D/819/1998 (2001), para.10.4.

[200] *G. A. Van Meurs v. The Netherlands*, U.N. Doc. CCPR/C/39/D/215/1986 (1990), para.6.2. See also HRC General Comment 32 (2007), supra note 2, para.28.

[201] *G. A. Van Meurs v. The Netherlands*, ibid.

it must give reasons for such decision. Thus in *Estrella v. Uruguay*, where proceedings were held by the military court in camera and Estrella was only informed at the prison that he had been convicted and sentenced to four and a half years imprisonment for conspiracy to subvert the Constitution, the HRC held that the facts disclosed a violation of Article 14 (1) of the ICCPR because, among other issues, Estrella was tried without a public hearing and no reason had been given to justify this in accordance with the ICCPR.[202]

The right to a public hearing is however subject to five important exceptions. The public including the press may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.[203] A tribunal that seeks to exclude public from all or part of the trial on the above grounds must specify the particular ground which justifies its action. In *Media Rights Agenda v. Nigeria*, while noting that these grounds are exhaustive, the ACHPR noted that the Government had only presented an omnibus statement in its defence to the effect that the right to fair hearing in public was subject to the proviso that the court or tribunal might exclude from the proceedings persons other than the parties thereto in the interest of defence, public safety, public order etc.[204] It emphasised that the Government of Nigeria had "…*not specifically indicated which of these circumstances prompted it to exclude the public from such trial. The Commission therefore considers the argument not sufficient enough to avail the Government of Nigeria such defence*."[205]

It is however emphasised, that notwithstanding the above exceptions to the right to a public hearing, any judgment rendered in a criminal case or in a suit at law must be made public except where the interest of juvenile persons otherwise requires or where

[202] *Estrella v. Uruguay*, U.N. Doc. CCPR/C/OP/2 at 93 (1990), para.10.

[203] Article 14 (1) of the ICCPR.

[204] *Media Rights Agenda v. Nigeria*, supra note 77, paras.52 and 53.

[205] Ibid, Emphasis added.

the proceedings concern matrimonial disputes or the guardianship of children.[206] A judgment is considered to have been made public either when it is orally pronounced in court or when it is published, or when it is made public by a combination of the two methods.[207] The HRC has also emphasised with regard to judgments that they must be in writing. In *Touron v. Uruguay*,[208] it lamented that in absence of a judgment in writing, it could not examine whether the proceedings against Touron amounted to a fair trial or whether the severity of the sentence imposed complied with the ICCPR. It therefore held that the trial of Touron violated Article 14 (1) of the ICCPR, because he had no public hearing and the judgement rendered against him was not made public because in the first place it was not in writing. The HRC has further stressed the point that judgments must be reasoned (i.e. they must contain the reasons for the decision). In *Hamilton v. Jamaica*,[209] it argued that the absence of a reasoned judgment was likely to prevent Hamilton from successfully arguing his appeal. It emphasised that in cases of appeal, without a reasoned judgement, it is difficult to identify the point of law or serious miscarriage of justice of which the appellant complains.

It necessarily follows that because of the importance of the right to a public hearing as analysed above, any exceptions to it must be strictly construed. This point is also underscored by the UN Principles on Military Justice which emphasise that all the acceptable grounds for excluding the public from judicial proceedings "...must be strictly interpreted, particularly when "national security" is invoked, and must be applied only where necessary in "a democratic society."[210] The HRC has also emphasised that apart from these exceptional circumstances, a hearing must be open

[206] Article 14 (1) of the ICCPR. It is important to stress the point that the requirement here is to make the judgment public and not to pronounce it in public as for instance is required by the African Commission Principles and Article 6(1) of the ECHR.

[207] Amnesty International (1998), supra note 63, para.24.1. See also Lawyers Committee for Human Rights (2000), supra note 59, p.13.

[208] See *Touron v. Uruguay*, Communication No. 32/1978, U.N. Doc. CCPR/C/OP/1 at 61 (1984), paras.11 and 12.

[209] *Hamilton v. Jamaica*, Communication No. 333/1988, U.N. Doc. CCPR/C/50/D/333/1988 (1994), paras.8.3 and 9.2.

[210] Supra note 54, para.49.

to the general public and must not be limited to a particular category of persons.[211] Although the HRC has tried to elaborate on the nature and scope of the exceptions to the right to a public hearing, they still raise important questions; answers to which are difficult to discern. For instance, what is the exact scope of these exceptions? What do the words "morals," "public order" and "national security" mean? How is it to be determined that a particular trial should not be public on any of these grounds?

Unfortunately, the nature and scope of the exceptions to the right to a public hearing is a matter that has hardly been explored in any substantial detail by human rights supervisory bodies and legal scholars. Nor does the *travaux preparatoires* of the ICCPR or the regional human rights instruments provide any indications as to what the parameters of these exceptions should be.[212] Given the importance that international human rights law attaches to the right to a public hearing, this is a surprisingly significant shortcoming. By failing to provide guidelines on the scope of the exceptions to the right to a public hearing, it means, inter alia, that the regional and international human rights treaty bodies have left the scope of these exceptions to be determined solely by the individual states; something that is regrettable. Without a clear criteria on how these exceptions should be interpreted, their inherent ambiguities make the right to a public hearing susceptible to abuse and evasion. It is therefore critical that the HRC and the ACHPR provide guidance on this matter. Although some expert groups have come up with some useful guiding definitions and principles in the above respect,[213] this does not absolve the international human rights

[211] HRC General Comment 32 (2007), supra note 2, para.29.

[212] In fact, during the drafting history of the ICCPR, some delegates wanted some of the exceptions to be deleted from the text for lack of specificity. For instance, Mr. Santa Cruz, the delegate from Chile argued that the words "public order" should be deleted since they lacked a standard interpretation under positive law or in any legal theory. See U.N.Doc. E/CN.4/SR.323 at 14 (5 June 1952).

[213] For instance, according to the Experts in International Law, National Security and Human Rights, " a restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use and threat of force, or its capacity to respond to the threat or use of force, whether from an external source, such as a military threat, or an internal source, such as incitement to overthrow government." See the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, October 1995, adopted at a meeting convened by the International Centre Against Censorship, and the Centre for Applied Legal Studies of the University of Witwatersrand, South Africa. See also Amnesty International (1998), supra note 63, para.14.3.

bodies like the HRC of their obligation to guide the international community on this matter.

2.3.5. The Right to a Fair Hearing

In addition to the guarantees of the right to a fair trial analysed above, international human rights law also provides for and protects the right to a fair hearing. The second sentence of Article 14 (1) of the ICCPR thus states inter alia that "…In the determination of any criminal charge against him, or of his rights and obligations in a suit at law…everybody shall be entitled to a fair… hearing…" Similarly, Article 10 of the UDHR declares, inter alia, that "Everyone is entitled in full equality to a fair… hearing…" The African Charter does not have any specific provision on the right to a fair hearing but Section A (1) of the African Commission Principles states in line with the analogous provisions of the ICCPR and the UDHR quoted above, that "...in the determination of any criminal charge against a person, or of his rights and obligations…everyone shall be entitled to a fair…hearing..." What then is the nature and scope of the right to a fair hearing as guaranteed by these provisions? How different is it from the general right to a fair trial? What is the relationship between the two?

First, it is critical to point out that the right to a fair hearing is only a procedural guarantee intended to secure procedural justice rather than outcome justice or result-oriented justice.[214] The HRC has emphasised in this regard that the right to a fair hearing as provided for in Article 14 of the ICCPR, guarantees only procedural fairness and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.[215] It is generally for the domestic courts to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was manifestly arbitrary or amounted to a manifest error or denial of justice.[216] Thus, in *Juan Martínez Mercader et al. v. Spain,*[217] while reiterating the above position, the HRC held that "…with regard to the authors' claim that the situations reported constitute a violation of article 14,

[214] Trechsel (2005), supra note 41, p.83.

[215] HRC General Comment 32 (2007), supra note 2, para.26.

[216] Ibid.

[217] *Juan Martinez Mercader et al. v. Spain*, U.N. Doc. CCPR/C/84/D/1097/2002 (2005).

paragraph 1, of the Covenant, the Committee considers that the allegations relate in substance to the assessment of facts and evidence made by the Spanish courts… The Committee considers that the authors have not sufficiently substantiated their complaint to be able to state that such arbitrariness or a denial of justice existed in the present case, and consequently believes that this part of the communication must be found inadmissible under article 2 of the Optional Protocol."[218]

As regards the essential elements and standards against which a hearing may be adjudged as fair, while observing that the ICCPR does not explain what is meant by a "fair hearing," the HRC has held that "…the concept of a fair hearing in the context of article 14 (1) of the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformation in pejus*, and expeditious procedure."[219] According to Section A (2) of the African Commission Principles**,** the essential elements of a fair hearing include: (a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military; (b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances; (c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings; (d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused; (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence; (f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings; (g) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body; (h) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body; (i) an entitlement to a determination of their

[218] Ibid, para.6.3. See also *Riedl-Riedenstein et al. v. Germany*, U.N. Doc. CCPR/C/82/D/1188/2003 (2004), para.7.3.

[219] *Yves Morael v. France*, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989), para.9.3.

rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and (j) an entitlement to an appeal to a higher judicial body.

Two key observations can be made from the jurisprudence of the HRC and Section A (2) of the African Commission Principles regarding the right to a fair hearing. First, the list of elements they espouse (which is open-ended) supports the view that the right to a fair hearing is used as a residual concept to address other issues (apart from those specifically catered for in the ICCPR and the African Charter respectively) which *ejusdem generis* may adversely affect the fairness of a trial.[220] For instance, in *Currie v. Jamaica*,[221] while noting that the ICCPR does not contain an express obligation for a state to provide legal aid for individuals in all cases, the HRC nonetheless held that the denial of legal aid in this particular case amounted to a violation of the right to a fair hearing within the meaning of Article 14 (1) of the ICCPR. Among the factors that informed the Committee's decision was the complexity of constitutional proceedings in Jamaica.

Second, in a number of cases, both the HRC and the ACHPR have found a violation of the right to a fair hearing based on the violation of the specific fair trial rights and guarantees provided for in the ICCPR and the African Charter. For instance, in *Civil Liberties Organisation et al v.Nigeria*,[222] the ACHPR held that the holding of the proceedings in secret (which is a violation of the right to a public hearing) was a violation of the victim's right to a fair hearing. It is therefore plausible to conclude that in addition to its residual meaning, the right to a fair hearing encompasses all the fair trial rights guaranteed under Article 14 of the ICCPR. This is in fact further supported by Section A (2) of the African Commission Principles which explicitly includes the specific fair trial guarantees under Articles 14 of the ICCPR and 7 of the African Charter as part of the right to a fair hearing. It therefore follows that there will

[220] For other exponents of this view, see Harris D (1967), "The Right to a Fair Trial in Criminal Proceedings as a Human Right," The *International and Comparative Law Quarterly*, Vol.16, No.2, p.357 and McGoldrick D (1994), *The Human Rights Committee: Its Role in the Development of the International Convention on Civil and Political Rights*, Clarendon Press, Oxford, p.417. See also Harris D, O'Boyle M, and Warbrick C (1995), *Law of the European Convention on Human Rights*, Butterworths, London, p.202.

[221] *Currie v. Jamaica*, U.N. Doc. CCPR/C/50/D/377/1989 (1994).

[222] *Civil Liberties Organisation, et al v. Nigeria*, supra note 8, para.39.

be noncompliance with the right to a fair hearing whenever any specific fair trial guarantee under Article 14 of the ICCPR or Article 7 of the African Charter is violated.

In a nutshell, the right to a fair hearing requires observance and respect of all the fair trial guarantees provided for under the ICCPR and the African Charter, in particular, Articles 14 and 7 respectively. If any of them is violated, the trial will not be fair. In this sense, the right to a fair hearing is one and the same with the general right to a fair trial. Yet it doesn't necessarily follow that the observance of all the fair trial guarantees provided for in the ICCPR and the African Charter ensures a fair trial. There might be other issues, apart from those specifically catered for under the fair trial provisions of the ICCPR and the African Charter, which may taint what would otherwise be a fair trial. To prevent this from happening, such issues are considered violations of the right to a fair hearing in its residual meaning. In this sense, while still a part of the general right to a fair trial, the right to a fair hearing goes beyond the treaty fair trial provisions and extends to guarantee the fairness of a particular trial in all aspects.

Consequently, in order to determine the fairness of a particular hearing/trial, regard must be had to the conduct of the entire proceedings. A classic example of this approach can be seen in *Gridin v. Russia*.[223] In this case, the author of the Communication alleged that between 26 and 30 November 1989 radio stations and newspapers announced that he was the feared "lift-boy" murderer, who had raped several girls and murdered three of them. He stated that the court room was crowded with people who were screaming that the author should be sentenced to death. He also stated that the social prosecutors and the victims were threatening the witnesses and the defense and that the judge did not do anything to stop this. Because of this, there was no proper opportunity to examine the main witnesses in court. Considering the proceedings as a whole, the HRC agreed with the author that his right to a fair hearing under Article 14 (1) had been violated. It held, inter alia, that "With regard to the author's claim that he was denied a fair trial in violation of article 14, paragraph 1, in particular because of the failure by the trial court to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for

[223] *Gridin v. Russia*, U.N. Doc. CCPR/C/69/D/770/1997 (2000).

defence counsel to properly cross-examine the witnesses and present his defence, the Committee notes that the Supreme Court referred to this issue, but failed to specifically address it when it heard the author's appeal. The Committee considers that the conduct of the trial, as described above, violated the author's right to a fair trial within the meaning of article 14, paragraph 1."[224]

Jurisprudence from the ECrtHR also points to the fact that no abstract definition or criteria for a fair hearing can be given and that in each case, the course of the proceedings as a whole has to be assessed. For instance in *Helle v. Finland*,[225] the ECrtHR stated that its task was "to assess whether or not the proceedings taken as a whole were fair within the meaning of Article 6 (1) having regard to all the relevant circumstances, including the nature of the dispute and the character of the proceedings in issue, the way in which the evidence was dealt with and whether the proceedings afforded the applicant an opportunity to state his case under conditions which did not place him at a substantial disadvantage vis-à-vis his [adversary]."[226]

2.4 Conclusion

This Chapter has explored the nature and scope of the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal especially as it relates to the administration of justice by military tribunals. It has been established that apart from being a treaty obligation, the right to a fair trial is also a general principle of law recognised by civilised nations and a norm of CIL within the meaning of Article 38 (1) of the Statute of the International Court of Justice. This means that even if Uganda was not a state party to any human rights instrument requiring the protection of the right to a fair trial, it would still, as a general rule, be bound to protect and uphold the right to a fair trial as a norm of customary international law. It has also been established that the right to a competent, independent and impartial tribunal is an absolute right which means that it applies in all circumstances without exception.

[224] Ibid, para.8.2.

[225] *Helle v. Finland* (1998) 26 EHRR 159.

[226] Ibid, para.53.

Critical for this thesis, it was confirmed that the right to a fair trial applies in full to military tribunals just as it does to the ordinary civilian courts. It does not however apply to all proceedings before military tribunals. For instance, it does not apply to disciplinary or administrative proceedings that do not involve penal sanctions. Military authorities cannot however evade the right to a fair trial by merely classifying charges/proceedings as "disciplinary" or "administrative." Depending on the very nature of the offence in question (i.e. whether in essence it is criminal) and the severity of the penalty, such proceedings could amount to "determination of a criminal charge," wherefore, the right to a fair trial will be applicable.

Regarding the content and scope of the right to a competent tribunal, it has emerged that the right has two major aspects i.e. the jurisdiction of a tribunal and the competence of the persons who constitute a tribunal. The former requires that military tribunals must have jurisdiction over both the subject matter and the persons they try. While it is recognised that jurisdiction of military tribunals like civilian courts is a matter determined by national law, international human rights law emphasises that the jurisdiction of military tribunals must be restricted to offences of a strictly military nature committed by military personnel. This rule is only subject to a situation where a state can show that trying civilians in military courts is necessary and justified by objective and serious reasons. The State that seeks to try civilians in military courts must demonstrate with regard to the specific class of individuals and offences at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high security civilian courts are inadequate to the task and that recourse to the military tribunals is unavoidable. These exceptions must be interpreted restrictively. It is incumbent on the state whose military tribunals try civilians to prove existence of the said grounds. International human rights law does not also generally consider military courts as competent tribunals for the purposes of trying military personnel accused of committing gross human rights violations. As regards the aspect of competence of persons who constitute military tribunals, it has been established that they must be people of integrity with appropriate legal training and qualifications comparable to those required of professional judges. It is only then that they can competently and properly administer justice according to established legal rules and procedures.

With respect to the content and scope of the right to an independent tribunal, it has been established that this requires both the institutional independence of military tribunals and the personal independence of the individuals who constitute the military tribunals. Institutional independence of military tribunals requires that military tribunals must be independent from the executive and the military hierarchy. They must not only be self-governing as regards their operations and administrative issues but must also be independent in their decision making. The executive and military hierarchical command must not interfere with the operations of the military tribunals and must respect their decisions. Institutional independence of military tribunals also requires that the decisions of military courts should never be the subject of review by non-judicial establishments.

The notion of individual independence as a key aspect of the right to an independent tribunal requires that persons appointed to military tribunals must be individuals of integrity with appropriate training. Significantly, it also requires that military judges must be protected from direct or indirect subordination within the context of the military hierarchy both in terms of the organisation and operation of the military justice system itself and in terms of career development. Finally, the requirement of individual independence of judges requires that tenure and financial entitlements and other benefits of the military judges and members of military tribunals must be secured against the discretionary or arbitrary interference by the executive, military hierarchy or any other appointing authority. Any dismissal or suspension of military judges must only be on grounds of misconduct and incompetence, in accordance with fair trial procedures set out by the law.

Concerning the right to an impartial tribunal, it has been ascertained that it not only requires that the military judges and the members of the military court be subjectively free from bias, but also that the entire organisation of military tribunals must appear to the reasonable observer to be impartial. There should be nothing which in an objective sense gives rise to an apprehension of the tribunal not being impartial.

With respect to the right to a public hearing, it has been established that the right includes two aspects, i.e. the public nature of the proceedings and publicity of decisions of tribunals. As regards the former, the general rule is that judicial proceedings must be open to the public including the press. It is required in this

respect that tribunals should make the information about the time and venue of proceedings available and provide adequate facilities for public attendance. The latter aspect requires that decisions of military tribunals should generally be available to public. This means in the first place that judgments of military tribunals just like with civilian courts, must be in writing and must at least contain a statement of the grounds for the decision. The right to a public hearing is however subject to five exceptions i.e. the press and public may be excluded on reasons of morals in a democratic society; on reasons of public order in a democratic society; on reasons of national security in a democratic society; in the interest of private lives of the parties; and in the interest of justice. Where a tribunal decides to hold proceedings in camera, it must justify its decision according to one or more of these exceptions which are considered exclusive. These exceptions are strictly interpreted and if invoked, must only go as far as is necessary to secure the respective interests.

Finally, this Chapter has established that as a matter of emphasis, the right to a fair hearing requires the protection and respect of all the fair trial guarantees protected in international human rights law, including the right to a public hearing by a competent, independent and impartial tribunal. But most important, in its residual sense and usage, the right to a fair hearing requires that no other issue, in addition to those specifically catered for under the fair trial provisions of the ICCPR, should *ejusdem generis* taint the fairness of a trial. Therefore, in order to determine whether a particular hearing is fair, regard must be had to the conduct of the proceedings as a whole.

It is the above requirements which international human rights law recognises as comprising the major content and scope of the right to a fair and public hearing by a competent, independent and impartial tribunal. It now remains to determine how these requirements have been complied with in Uganda's military justice system. The next Chapter examines the compliance of Uganda's military justice with the above requirements over the years.

CHAPTER THREE

UGANDA'S MILITARY JUSTICE THROUGH THE TIMES (1895-1992)

Having examined the concept of military justice, and analysed the nature and scope of the right to a fair trial, and particularly having established that the right to a fair trial applies in full to military tribunals in the administration of military justice as it does to civilian and other special courts in the preceding chapters, it is now appropriate to examine how this right has been protected and guaranteed in Uganda's military justice system over the years. This Chapter thus analyses the historical foundation, development and evolution of Uganda's military justice system especially as it relates to the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. This analysis is important because, as it shall become apparent, Uganda's current military justice has been and remains in many ways shaped by its historical origins. Until this background is fully appreciated and put into context, Uganda's military justice system may never fully evolve from its traditional patterns to fully comply with the country's international human rights obligations regarding the right to a fair trial. It is indeed part of the hypothesis of this thesis that although there have been attempts at reforming the country's military justice system, it is still in many ways stuck in its historical origins.[1]

The analysis in this Chapter starts with an examination of Uganda's military justice during the colonial era, followed by an appraisal of the country's military justice in the immediate post-independent Uganda. In examining Uganda's immediate post-independence military justice, particular attention is given to military justice under President Idi Amin's regime and President Museveni's style of military justice under the Code of Conduct for the National Resistance Army (NRA) and the NRA Operational Code of Conduct. It has been considered not to discuss Uganda's military justice under the NRA Statute 1992 in any substantial detail because the provisions dealing with military justice in this law are essentially the same as those contained in the Uganda People's Defence Force (UPDF) Act 2005 which is comprehensively examined in Chapter Four. In order therefore not to engage in unnecessary repetitions that would not add value to this thesis, this Chapter only highlights a few issues

[1] See Chapter One, Section 1.3.

regarding military justice under the NRA Statute 1992. To start off the analysis, three preliminary questions must be posed: What are the origins of Uganda's military justice system? To what extent, if at all, did Uganda's early military justice legal frameworks during the colonial era guarantee the right to a fair trial, in particular, the right to a fair and public hearing by a competent, independent and impartial tribunal? In relation to Uganda's early military justice legal frameworks, how has the country's military justice system performed, over the years, as far as guaranteeing this right is concerned?

3.1 Uganda's Military Justice During the Colonial Epoch (1895-1962)

Uganda's army as a national institution was first established by the Uganda Rifles Ordinance, passed by the British Parliament in September 1895,[2] hardly a year after the country had been formerly declared a British Protectorate.[3] The Uganda Rifles Ordinance empowered the Commissioner to maintain a force to be called the Uganda Rifles whose number and status of officers and men was to be in accordance with instructions from the Secretary of State of Britain.[4] The Uganda's Riffles Ordinance 1895 was the first legal framework to provide for the organisation and administration of military justice in Uganda. The fact that this law and the immediate subsequent military justice legal frameworks came from the British Parliament, it is tenable to argue that, in that sense, the origins of Uganda's military justice system as were reflected in those legal instruments were British.

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[2] Prior to 1895, each kingdom in the area that became Uganda had its own army; with Buganda and Bunyoro-kitara kingdoms having the most advanced military organisations. For an exposition to Uganda's pre-colonial armies, see Omara-Otunnu A (1987), *Politics and the Military in Uganda 1890-1985*, MacMillan Press Ltd, London, pp.1- 4. See also Kirunda-Kivejinja AM (1995), *The Crisis of Confidence*, Progressive Publishing House, Kampala, pp.140-141.

[3] Uganda was officially declared a British protectorate on 19th June 1894. It remained under British colonial rule until 9th October 1962 when it attained its independence. For a thorough exposition of the political history of Uganda, see Kanyeihamba GW (2002), *Constitutional and Political History of Uganda: From 1894 to the Present*, Century Publishing House Ltd, Kampala and Karugire SR (1980), *A Political History of Uganda*, Heinemann Educational Books, Nairobi. See also Morris H, and Read J (1996), *Uganda: The Development of its Laws and Constitution*, Stevens and Sons, London.

[4] Section 3 of the Uganda Rifles Ordinance 1985. The Commissioner was the head of the colonial Government and Her Majesty Queen Victoria's representative in Uganda. Ibid, Section 2.

The Uganda Rifles Ordinance 1895 did not put in place any clear and fair mechanism for administering military justice. Instead, it vested arbitrary and dictatorial powers in the Commandant,[5] Chief Officers[6] and Commanding Officers.[7] For instance, in cases of aggravated or repeated offences, the Commandant had power to charge, investigate and convict any accused person and could impose sentences ranging from reduction in rank, to imprisonment, hard labour, corporal punishment and dismissal from the force.[8] In a bid to check on the said powers and probably ensure impartiality and fair justice, Section 39 of the Ordinance provided that the Commissioner could, if he thought fit, order that all or any of the powers of the Commandant be exercised with the aid of not less than two assessors. But given its limitations, this mechanism could not have been effective in ensuring impartiality and fair justice. First, the opinions of the assessors were not binding on the Commandant. Secondly, the assessors were not independent from the Executive. They were named and appointed by the Commissioner. Besides, it was in the entire discretion of the Commissioner to choose whether or not to appoint the assessors. Indeed even where he chose to do so, his decision could be revoked at any time.

It is significant that the commandant, chief officers and commanding officers were all appointed by the Commissioner and were answerable to him.[9] They cannot therefore generally be taken to have been independent from the Executive and the military command influence; a requirement that is fundamental to the administration of justice in any democratic society. The issue here is not so much that the 1895 Uganda Rifles Ordinance or indeed other legislation during the colonial times should have provided adequately for fair trial guarantees as expected under modern democratic systems or under modern human rights law, but that much of the essence of the provisions of

[5] The Commandant was the officer in chief command of the Uganda Rifles.

[6] Chief Officers were defined in Section 2 of the Ordinance to include wing officers, and all officers above the rank of wing officer. Under Section 26, they could inquire into and try any offence against discipline committed by any native officer, under officer and privates. On conviction, they could impose sentences of imprisonment, with or without hard labour, fines not exceeding 2s, confinement to barracks, and extra guards and piquets.

[7] Under Section 31 (2) of the Ordinance, in cases of distant stations, the Commissioner could delegate the powers of the Commandant under Sections 30 and 31 to the commanding officers of such stations.

[8] Ibid, Sections 30 and 31.

[9] Ibid, Section 3.

Uganda's early military justice legal frameworks continue to feature in the country's military justice system.

During the subsistence of a state of war between Her Majesty Queen Victoria of Britain and any foreign power or African State or tribe, a different kind of military justice applied to the officers and men of the Uganda Rifles engaged in such fighting. In such cases, the provisions of the Army Act of the Imperial Parliament[10] relating to mutiny, desertion and other offences punishable by a sentence of a court-martial applied to the Uganda Rifles, but with some modifications.[11] Tribunals set up to try such offences were given powers of a general court martial and could pass any sentence including death.[12] As expected, members of these tribunals were not independent from the Executive or the command influence of the army. They were either directly appointed by the Commissioner or the Commandant.[13] They had to be officers of the Uganda Rifles or of Her Majesty's army.[14] There were generally no measures to ensure the independence and impartiality of the members of military tribunals.

On 20th February 1899, the Uganda Military Force Ordinance, 1899, was passed by the Imperial Parliament. This Ordinance repealed and replaced the Uganda Rifles Ordinance, 1895. The Uganda Military Force Ordinance, 1899, changed the name of Uganda's army from Uganda Rifles to the Uganda Military Force.[15] Its major significance to the country's military justice was that it made the provisions of the Army Act of the Imperial Parliament relating to offences to generally apply to native officers, non-commissioned officers and privates.[16] However, where the Uganda

[10] Statute 44 & 45 Vict., Cap 58.

[11] Ibid, Section 58.

[12] Ibid, Section 58 (1).

[13] Ibid, Section 58 (3).

[14] Ibid, Section 58 (2).

[15] See Section 3 of the Uganda Military Force Ordinance, 1899.

[16] Ibid, Section 24. A native officer was defined in Section 2 to mean any officer (other than Europeans) above the rank of Sergeant-Major.

Military Force Ordinance 1899 was at variance with the Army Act, the Ordinance would take precedence.[17]

In 1902, the Imperial Parliament passed the King's African Rifles Ordinance 1902,[18] which established two battalions of troops in Uganda to form part of a regiment of His Majesty's forces known as the King's African Rifles (KAR).[19] Every man enlisting or re-engaging in the regiment had to swear an oath of allegiance to the British Crown similar to that of the Uganda Rifles.[20] The regiment was charged with the duty to defend East Africa, Uganda, British Central Africa and Somaliland protectorates.[21] As regards discipline and military justice, two systems applied to the Uganda battalions as part of the K.A.R depending on the situation. When on active service, within the meaning of the Army Act of the Imperial Parliament, the native officers, non-commissioned officers and privates were subject to that Act and Articles of War of the United Kingdom.[22] But when found guilty of any offence under the Army Act of the Imperial Parliament, any native officer, non-commissioned officer or private could be punished as provided for under the King's African Rifles Ordinance.[23] European officers and non-commissioned officers appointed to or attached to the regiment were at all times subject to the Army Act of United Kingdom.[24]

When not on active service, a different justice system applied. This comprised of summary trial by the commanding officer and trial by courts-martial where the

[17] Ibid, Section 24.

[18] Ordinance No.8 of 1902, Uganda Protectorate Laws 1895-1904.

[19] Ibid, Sections 4 and 5 (1). These troops were styled and known as the 4th and 5th Battalions of the K.A.R. ibid. For a detailed exposition of the history of the K.A.R, see Moyse-Bartlett H (1956), *The King's African Rifles: A Study in the Military History of East and Central Africa,1890-1945*, Gale and Polden, Aldershot. See also Page M (1998), *A History of the King's African Rifles and East African Forces*, Leo Cooper, London. For an account of a Ugandan soldier's experience as part of K.A.R, see Kakembo RH (1946), *K.A.R: An African Soldier Speaks*, Edinburgh House Press, London.

[20] Ibid, Section 19.

[21] Ibid, Section 5 (2).

[22] Ibid, Section 32 (b).

[23] Ibid.

[24] Ibid, Section 32 (a).

commanding officer deemed it fit.[25] Under Section 40 (2), where the commanding officer dealt with the case summarily, he could sentence the offender to imprisonment (with or without hard labour) for any period not exceeding 42 days, reduce the rank of the offender, award corporal punishment not exceeding 25 lashes, impose fine not exceeding 10s levied by stoppages from the offender's pay and dismiss the offender from the regiment. For purposes of trial by courts-martial, the Ordinance established two courts-martial i.e. the general courts-martial and the regimental courts-martial.[26] A general court martial had power to try all persons subject to the King's African Rifles Ordinance 1902, and to pass any sentence including death.[27] A regimental court martial could not award the punishment of death or imprisonment in excess of two years.[28]

Although the establishment of courts-martial was a landmark step in the evolution of Uganda's military justice system, a critical analysis of the provisions governing these tribunals hardly shows any guarantee for ensuring their independence and impartiality or measures to generally ensure fair trials. The law still lodged all but dictatorial and arbitrary powers in the persons of commanding officers. It was the commanding officers who convened these courts,[29] appointed the members[30] and the presidents of these courts.[31] The commanding officers even had power to appoint themselves presidents of these courts.[32] It was also within the powers of the commanding officers to confirm the findings and sentences of courts-martial.[33] Obviously this arrangement of courts-martial could not guarantee any independence or impartiality of the members nor ensure fair justice.

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[25] Ibid, Section 40 (1).

[26] Ibid, Section 43 (1).

[27] Ibid, Section 43 (6).

[28] Ibid, Section 43 (7).

[29] Ibid, Section 43 (2) in case of general courts-martial and Section 43 (3) in case of a regimental court-martial.

[30] Ibid, Section 43 (4) in case of general courts-martial and Section 43 (5) in case of regimental courts-martial.

[31] Ibid, Section 43 (8).

[32] Ibid, Section 43 (4) in the case of the general court martial and Section 43 (8) in the case of the regimental court martial.

[33] See ibid, Sections 44 (a) and (b).

It is important, though, to observe that military justice systems of the time including those in the developed world were generally arbitrary and tyrannical in nature. They were heavily disciplinarian and generally emphasized the iron hand of discipline over fairness and justice as the core of military justice. As Sherman rightly observes, it was after World War II, and mainly as a result of popular dissatisfaction with wartime military justice, that many western nations began to re-examine the arbitrariness of their military justice systems and started adopting more judicial approaches and procedures.[34] As a result of this very bad war time experience with courts-martial, West Germany, Austria, and Demark abolished their court-martial systems and other countries such as Great Britain retained them but adopted more judicial procedures and expanded civilian control over certain of its functions.[35] In Uganda's case however, the arbitrariness of the military justice system could have been compounded by the ideology of racial supremacy. As Oloka-Onyango observes, this ideology refused to equate colonial subjects to other species of humankind, particularly *homo colonialis*.[36] That is why for instance, among other reasons, the European officers in the Uganda armed forces were generally subject to different standards of military justice from those that applied to Ugandans.

However, by the dusk of colonialism, Uganda's military justice had improved and had started providing some guarantees for ensuring fair trials. Three reasons could explain for this change. First, the Colonial Government's mission had been largely accomplished, so it was no longer necessary to keep the tyrannical grip over the army including in the area of military justice. The second factor could have been the influence of the adoption of important human rights instruments such as the Universal Declaration of Human Rights and the Charter of the United Nations which emphasized equality of all human beings and the need to protect and respect human rights and freedoms. Finally, after World War II, Britain like many other western countries re-examined its military justice system and undertook many reforms to

[34] Sherman E (1973), "Military Justice Without Military Control," *Yale Law Journal*, Vol.82, No.7, p.1398.

[35] Ibid.

[36] Oloka-Onyango J (1993), "Judicial Power and Constitutionalism in Uganda," Working Paper No. 30, Centre for Basic Research, Kampala, p.16.

make it more humane and fair. This could also have had an impact on the reforms which were subsequently introduced in Uganda's military justice system.

On 24th June 1958, the King's African Rifles Ordinance 1958[37] was passed to consolidate and amend the law relating to the establishment, government and discipline of the K.A.R among other things.[38] This law dramatically altered the administration of military justice in Uganda. It established a three tier courts-martial system, namely, general courts-martial,[39] district courts-martial[40] and field general courts-martial.[41] Significant for ensuring the independence and impartiality of these courts-martial, the Ordinance provided that the officer who convenes a court-martial would not be a member of that court.[42] A proviso was however included to the effect that in the case of a field general court martial, the convening officer could appoint himself president if it was not practicable to appoint another officer as president. The law also made it possible for non-military officers to be appointed presidents and members of courts-martial, in particular where in the opinion of the convening officer,

[37] Ordinance No. 34 of 1958, Laws of Uganda, 1958.

[38] See the long title of the Ordinance.

[39] See Sections 74 (1) and 77. A general court martial had power to try any person subject to the Ordinance for any offence triable by courts-martial and to award any punishment under the Ordinance. See Section 75 (1).

[40] See Sections 74 (1) and 77. A district court- martial had powers of a general court-martial except that it could not try an officer or warrant officer holding the appointment of *effendi*. Neither could it sentence any other warrant officer to imprisonment or discharge with ignominy. It had no powers to award a death sentence or imprisonment for a term exceeding two years. See Section 75(2). District courts-martial were established according to military districts. The law empowered the Governor to appoint and establish military districts throughout the protectorate in which units of the Force could be raised and trained for the defence and internal security of the protectorate.

[41] Section 74 (2). A field general court martial had the powers of a general court martial, except that where it was consisted of less than three officers, it could not award a sentence exceeding imprisonment for two years. See Section 75 (3). According to Section 79 (1), a field general court martial was to consist of the president and not less than two other officers, but if the convening officer was of the opinion that three officers having suitable qualifications were not available, it could consist of the president and one other officer.

[42] See Section 80 (1).

the necessary number of military officers having suitable qualifications was not available.[43]

Accused persons to be tried by any court-martial, were given the right, on any reasonable grounds to object to any member of the court including the president.[44] It was however within the powers of the other members of court to consider the objection and in particular whether it was reasonable or not. It is curious to imagine what would happen if the accused objected to all members since the law did not provide for such a scenario. Whereas the above provision was aimed at assuring the accused of the independence and impartiality of court, it is unlikely that it achieved this objective since the members of courts-martial were not insulated from the command influence of the convening officer. It is unlikely that the other members of court would dare agree with the accused person's objection against their commander's choice.

The 1958 King's African Rifles Ordinance also provided that the Governor or the convening officer could appoint a judge advocate to act at the court-martial.[45] While this was an important development for ensuring that courts-martial comply with the law and that the accused did not suffer a miscarriage of justice, the independence of the judge advocate from the appointing authority and the army command influence was not secured. As Lamer C.J rightly emphasized, in order to comply with the requirement of an independent and impartial tribunal, the appointment of an army officer to sit as judge advocate at court-martial must be in the hands of an independent and impartial officer.[46]

[43] Section 80 (4) c. A "military officer" was defined in Section 80 (5) to mean an officer belonging to her Majesty's military forces and subject to service law.

[44] See Section 82 (1). For purposes of enabling the accused to avail himself of the right conferred, the names of the members of the court were required to be read over in the presence of the accused before they were sworn and the accused would be asked whether he objects to any of the named officers. See Section 80 (2).

[45] Section 116.

[46] *R v. Genereux* [1992] 1.S.C.R. 259, p.309.

Perhaps the most important reform introduced by the 1958 King's African Rifles Ordinance in Uganda's military justice system was the right of appeal to a civilian court. A person convicted by a court-martial, could, with leave of the High Court, appeal to the High Court against their conviction.[47] When hearing an appeal from the general court martial or field general court martial, the High Court was to be composed of at least three judges,[48] and in case of an appeal from a district court-martial, one or more judges.[49] For the first time in Uganda's military justice history, persons subject to military law now had a genuine independent and impartial appellate tribunal to interpret and apply military law.[50] This development also set in motion a process of "civilianization" of the military justice which could ensure civilian control and scrutiny of military tribunals to ensure that they did not abuse their powers.

In preparation for and shortly before Uganda's independence, on the 17th September 1962, the Uganda Military Forces (Constitution and Miscellaneous Provisions) Ordinance[51] was passed to constitute the units of the K.A.R established and maintained under the King's African Rifles Ordinance, 1958, as units of the Uganda Military Forces: to re-entitle the King's African Rifles Ordinance, 1958 and to amend the law relating to military forces among other things.[52] The units of K.A.R raised or deemed to have been raised under the King's African Rifles Ordinance, 1958, and established and maintained immediately before the operative date of the Ordinance,

[47] Section 122.

[48] Section 137 (1).

[49] Section 137 (2). Under Section 126, the High Court was the final appellate tribunal on issues of military justice as provided for in the Ordinance.

[50] Prior, the only recourse after conviction was the mechanism of confirmation of findings and sentence of the court-martial. This mechanism was never independent. The commanding officers, who proffered charges against the accused, convened the court-martial and appointed members of the court, also had the power of confirmation of the findings and sentence of courts-martial. It is significant to note that in addition to retaining this mechanism, the 1958 King's African Rifles Ordinance also provided for the mechanism of review of findings and sentences of courts- martial after confirmation, by the Governor, or any officer superior in command to the confirming officer. See Section 9 of the 1958 King's African Rifles Ordinance.

[51] Ordinance No.52 of 1962. According to Section 1 (3), this ordinance was to come into force on the 9th October, 1962- the day Uganda attained its independence from Britain.

[52] See the long title of the Ordinance.

from that date constituted units of the Uganda Military Forces.[53] From and after the operative date of the Ordinance, the King's African Rifles Ordinance, 1958, was re-entitled the Uganda Military Forces Ordinance, 1958 and was to be cited as such.[54] The military law under the Ordinance re-entitled the Uganda Military Forces Ordinance, 1958 was to continue in full force and effect until amended or repealed according to established law.[55] Section 6 established the Uganda Military Forces Council to take responsibility for the command, discipline and administration of, and all other matters relating to, the Uganda Military Forces.

3.2 Uganda's Post Independence Military Justice (1962-1992)

The attainment of Uganda's independence marked an important era in the protection of human rights in the country, at least insofar as their recognition within the country's legal framework was concerned. For the first time in Uganda's legal and constitutional history, Chapter III of Uganda's Independence Constitution,[56] as agreed during the Uganda independence conferences,[57] contained extensive provisions for the protection of individual rights and freedoms. The right to a fair trial was guaranteed under Section 24.[58] Section 24 of the Constitution provided that any person charged with a criminal offence was entitled to a fair hearing within a reasonable time by an

[53] Section 3 (1).

[54] Section 4 (1).

[55] Section 13 (1).

[56] This Constitution was attached as a schedule to the Uganda (Independence) Order in Council, 1962, passed by the Imperial Parliament on 2nd October 1962. The Order was passed among other things to make provision for the establishment of the Constitution of Uganda. Section 3 of the Order provided that the Constitution of Uganda set out in the schedule would come into effect in Uganda at the commencement of the Order. Section 1(2) provided that the Order would come into operation immediately before 9th October 1962. The Uganda Independence Act, 10 &11 Eliz. 2 Cap 57 passed earlier by the Imperial Parliament on 1st August 1962 made provision in Section 1 (1) that Her Majesty Government in the United Kingdom would cease to have responsibility for the government of Uganda on the 9th October, 1962.

[57] For details of what transpired at these conferences see Colonial Office (1961), Uganda: Report of the Uganda Constitutional Conference, 1961 and Text of the Agreed Draft of a New Buganda Agreement Initialed in London on 9th October 1961, London. For the second conference, see Colonial Office (1962), Report of the Uganda Constitutional Conference, 1962, London.

[58] According to the marginal note of this section, it was provided that the section was aimed at making "provisions to secure protection of law."

independent and impartial tribunal established by law.[59] Such person(s) were to be presumed innocent until proved guilty,[60] and had to be informed as soon as practical, in detail, in a language that they understand, of the nature of the offence they were charged.[61] It was a requirement that persons charged with criminal offences were to be given adequate time and facilities for the preparation of their defence,[62] and be permitted to defend themselves in person or, at their own expense, by a legal representative of their own choice.[63] At the trial, it was provided that accused persons were entitled to free assistance of an interpreter where they did not understand the language used,[64] and had to be afforded facilities to examine prosecution witnesses, and to call and examine their own witnesses.[65]

Fundamental for the right to protection against double jeopardy, it was provided that no one could be tried a second time for an offence for which he had been tried before, or of which he could have been tried and convicted at a former trial.[66] It was prohibited to compel an accused person to give evidence at the trial[67] and no person could be convicted of an offence unless the offence was defined and the penalty therefore prescribed in written law.[68] In its totality, Section 24 of the Uganda's Independence Constitution practically provided for the right to a fair trial almost in similar terms as it is currently understood in international human rights law. This is not so surprising, given the fact that as Morris and Read point out, the human rights provisions in this Constitution were modelled along the lines of the European

[59] Section 24 (1).

[60] Section 24 (2)a.

[61] Section 24 (2)b.

[62] Section 24 (2)c.

[63] Section 24 (2)d.

[64] Section 24 (2)f.

[65] Section 24 (2)e.

[66] Section 24 (5). In addition, Section 24 (6) provided that no person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

[67] Section 24 (7).

[68] Section 24 (8).

Convention on Human Rights[69] whose conformity with international human rights law has generally never been questioned.

In light of the above constitutional development, and the developments of Uganda's military justice during the colonial period, two key questions must be asked as we proceed to analyse Uganda's post-independence military justice: First, to what extent did the immediate post-independence military justice systems guarantee and comply with the constitutionally guaranteed right to a fair trial, in particular the right to a fair hearing by an independent and impartial tribunal? This question is important because Section 1 of the 1962 Independence Constitution provided in no uncertain terms that the Constitution was the supreme law of Uganda and that any law inconsistent with it was void to the extent of the inconsistency. Second, how far did Uganda's post-independence military justice go in strengthening the guarantees for the protection of the right to a fair trial as provided for in the 1958 Uganda Military Forces Ordinance?

After independence, the Parliament of Uganda seems not to have been in any hurry to interfere with the military justice legal framework left by the departing British colonial masters. In fact, in October 1963, the Parliament of Uganda confirmed that despite the new Constitution, the military law passed by the colonial administration in 1958 (i.e. the Uganda Military Forces Ordinance 1958) would continue in full operation and force until such a time as it would be amended.[70] Omara-Otunnu observes in this respect that this was a mockery of the very achievement of independence; for it concerned one of the most sensitive and critical organs of the state.[71] Nevertheless, in September 1964, the Parliament of Uganda passed the Armed

[69] Morris H, and Read J (1996), *Uganda: The Development of its Laws and Constitution*, Stevens and Sons, London. p.169.

[70] Omara-Otunnu (1987), supra note 2, p.53.

[71] Ibid. In fact, this failure to immediately repeal and or amend Uganda's colonial military law to, inter alia, address issues like Africanisation which dominated the rank and file in the army during the first years of Uganda's independence contributed to the January 1964 army mutiny in Jinja. Similar mutinies had earlier but almost at the same time occurred in Tanzania and Kenya. Omara-Otunnu observes that "each mutiny ostensibly started as a protest against existing conditions of service and a demand for Africanisation in the military, but gained political significance when the mutineers refused to obey their European officers and instead used physical violence against them." The mutineers wanted to remove the British officers who currently held key positions in the different armies. For a

Forces Act[72] which repealed and replaced the Uganda Military Forces Ordinance, 1958, as the legal framework for the establishment, maintenance and discipline of the Uganda Military Forces.

The 1964 Armed Forces Act maintained summary trials by commanding officers but made provision for the accused persons to elect to be tried by court-martial.[73] It established a three tier court-martial system i.e. the general court martial,[74] the disciplinary court martial[75] and the court martial appeals court.[76] As a departure from the Uganda Forces Military Ordinance, 1958, the convening authority for general courts-martial and disciplinary courts-martial was the Defence Council,[77] which also had the power to appoint the president and members of the court. Officers responsible for convening courts-martial, prosecutors, the commanding officer of the accused person, provost officers and any person who prior to the court-martial participated in any investigation respecting the matters upon which a charge against the accused person was founded were ineligible to serve on courts-martial.[78] This was a critical provision for ensuring independence and impartiality of courts-martial.

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detailed analysis of the 1964 army mutinies in Uganda, Kenya and Tanzania, see Omara-Otunnu (1987), supra note 2, pp.48-64. See also generally Parsons TH (2003), *The 1964 Army Mutinies and the Making of Modern East Africa*, Greenwood Press, London.

[72] Cap 295, Vol. VIII, Laws of Uganda, 1964.

[73] Section 63.

[74] Section 66. A general court martial was to consist of not less than five officers of certain ranks. ibid. Under Section 67, its jurisdiction extended to any person subject to the code of service discipline who was alleged to have committed a service offence.

[75] Section 70. A disciplinary court-martial was to consist of not less than three officers of certain ranks. According to Section 72, a disciplinary court-martial had power to pass any sentence or punishment except those that were higher in the scale of punishments than dismissal with disgrace from the Armed Forces. According to Section 78 which provided for the scale of punishments, only death and imprisonment for two years or more were higher in scale than dismissal with disgrace.

[76] Section 89.

[77] Section 65. Under Section 76 of the 1958 Uganda Military Forces Ordinance, general courts- martial were convened by officers authorized by the Governor and the district courts martial could be convened by any officer authorized to convene general courts-martial. A field general court martial was convened by the officer who directed that the charge should be tried by field general court martial.

[78] Sections 69 and 74.

An important development introduced by the 1964 Armed Forces Act was that any person to officiate as judge advocate at a general court-martial was to be appointed by the Chief Justice in consultation with the Attorney General.[79] This was critical for not only guaranteeing that the persons appointed judge advocates were competent, but also ensuring their independence from the convening authorities of courts martial and the army command influence. Other factors remaining constant, it is arguable that there can be no better persons to guarantee competence in the above respect than the Chief Justice and the Attorney General. The above position contrasts sharply with the position under the Uganda Military Forces Ordinance 1958, where the responsibility for the appointment of the judge advocate was vested in the Governor and the convening officers of courts-martial.[80]

Another important reform introduced by the 1964 Armed Forces Act was that it established the Court Martial Appeals Court to hear and determine all appeals referred to it from decisions of the general court-martial and the disciplinary court-martial.[81] The Court Martial Appeals Court replaced the High Court as the last appellate court on issues of military justice. But beyond mere replacement, the Court-Martial Appeal Court came with important reforms. The Court-Martial Appeal Court was to be composed of the Chief Justice and all puisne judges of the High Court, with the Registrar of the High Court serving as its Registrar.[82] The court was to be duly constituted if it consisted of an uneven number of judges not less than three[83] summoned in accordance with the directions given by the Chief Justice.[84] It is arguable, at least in theory, that the fact of the chief justice becoming a member of this court strengthened the right of appeal and enhanced the quality of military justice.

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[79] See Section 68. Going by the language used in Section 68, it was a must to appoint a person to officiate as judge advocate at a general court martial.

[80] See Section 116 of the Uganda Military Forces Ordinance 1958. From the language of this section, it was not mandatory to appoint a judge advocate to act at the general court martial.

[81] Section 89 (1).

[82] See Section 89 (2) of the Armed Forces Act 1964 and R.1 of the Armed Forces (Court-Martial Appeal Court) Regulations, SI 163/66. See also Iya PF (1973), *The Law and Its Administration in Uganda*, Law Development Centre, Kampala, p.35 and Ayume FJ (1986), *Criminal Procedure and Law in Uganda*, Longman, Nairobi, p.236.

[83] Armed Forces (Court-Martial Appeal Court) Regulations, ibid, R.2 (2).

[84] Ibid, R.2 (1).

It also enhanced civilian scrutiny of military justice which is critical for checking excesses of military tribunals.

In spite of the safeguards in the Armed Forces Act and the Constitution for the protection of the right to a fair trial, Uganda's military courts of the time, in particular President Amin's military tribunals were often convened and acted contrary to the law. Because of the profound effects of President Amin's regime to the country's military justice system especially as far as guaranteeing and upholding the right to a fair trial is concerned, the next subsection is dedicated to analysing the administration of military (in)justice during the Amin era.

3.2.1 President Idi Amin's Military Justice

Perhaps the most abominable courts-martial in Uganda's post-independence history (especially as far as upholding the right to a fair trial is concerned) were those established during President Idi Amin's regime.[85] They can only be compared to President Museveni's military tribunals under the NRA Codes of Conduct which are discussed in Section 3.2.2 below. In total disregard of the Constitution and the provisions of the Armed Forces Act, military justice as dispensed by President Amin's military tribunals violated all the tenets of the right to a fair trial. First, the tribunals were composed of illiterate individuals who did not have any basic understanding of the law.[86] This amounted to violation of the right to a competent

[85] President Idi Amin came to power on 25 January 1971 through a coup *d'etat* he staged when President Apollo Milton Obote was away in Singapore attending the Commonwealth Heads of State and Government Conference. Through Legal Notice No.1 of 1971 which ushered in his regime, President Amin suspended Sections 1, 3 and 63 of the 1967 Constitution inter alia. In effect, this meant that the Constitution was no longer "supreme law," that it could be altered without reference to the Parliament, and that Parliament lost its law-making powers to the Head of State – who was now empowered to rule by Presidential decree. See Oloka-Onyango (1993), supra note 36, p.31.

[86] See Onoria, HM (1994), "Soldiering and Constitutional Rights in Uganda," *The East African Journal of Peace and Human Rights*, Vol.9, No.1, p.100. This is not surprising. President Idi Amin's Government was largely composed of illiterate and semi-illiterate officers. The President himself is said to have ended in Primary Three. His Vice President was not any better. In fact, in an interview, the Vice-President during Amin's regime - Mr. Adrisi Mustafa, confessed that during his vice presidency, he did not even know of such a thing as the Constitution. See Mukholi D (1995), *A Complete Guide to Uganda's Fourth Constitution: History, Politics and the Law*, Fountain Publishers, Kampala, p, p.20.

tribunal as protected in international human rights law.[87] In *Civil Liberties Organisation v Nigeria*, the ACHPR emphasized that competence of a tribunal also requires a judicial system with adequately trained officers and satisfactory procedural rules.[88]

Also, Amin's military tribunals were never independent and impartial as was required by Section 15 of the 1967 Republican Constitution.[89] They were staffed with serving military men whose only basis of appointment was loyalty to President Amin and the fact that they could be relied upon to convict whoever the military regime wanted convicted.[90] Contrary to the fundamental principle of presumption of innocence, Amin's military tribunals also often proceeded on the premise that suspects were guilty of the offences with which they were charged. The International Commission of Jurists for instance reports about an incident were a suspected rebel was sentenced to death by firing squad on the basis of "curious entries" in his diary, which he could not explain. [91] The right to a fair trial within a reasonable time as guaranteed by the Constitution was understood to mean instant (in)justice and on conviction, the

[87] Although the 1962 Constitution did not specifically provide for the element of competency of court as part of the right to a fair trial, it is arguable that it necessarily follows from logic. Otherwise, how would the courts administer justice without knowing the basics of law? Any serious Government had to be cautious about the need to have competent personnel to sit as members of such courts.

[88] *Civil Liberties Organisation v Nigeria*, African Commission on Human and Peoples Rights, Commn. No. 129/94.

[89] It is important to highlight the fact that while President Amin suspended several parts of the 1967 Constitution, he did not tamper with the Bill of Rights. But since the effect of suspending critical provisions of the Constitution was to make him the sole law-maker, it meant that he could tamper with the Bill of rights at any time. Indeed he passed several degrees which adversely affected the enjoyment of the constitutionally guaranteed rights. For instance, Decree 13 of 1971 empowered the army and prison officers to arrest any person without a court order or a warrant and the Detention (Prescription of Time Limit) Amendment Decree authorized the detention of suspects for an unlimited period without trial.

[90] See International Commission of Jurists (1977), *Uganda and Human Rights: Reports of the International Commission of Jurists to the United Nations*, Geneva, Switzerland, p.25.

[91] Ibid.

tribunals normally had a standard sentence, i.e. death by firing squad.[92] This not only infringed the right to a speedy trial but also amounted to denial of the accused persons' right to adequate time for preparation of their defence and constituted a violation of the right to life as was guaranteed by the Constitution. In sum, as Amnesty international observed in its June 1978 report on human rights in Uganda;

> ... the military tribunals were a complete travesty of any accepted norms of justice. Their members had no legal training, the defendants were usually denied legal representation; a legally qualified "court advisor" has no power to intervene where legal procedures are contravened, such as rules of evidence and other internationally accepted judicial norms; trials are often in closed court and proceedings are not published. Cases are known of trials which have been conducted in secret or even without the defendant's knowledge. There is no appeal from these tribunals to a non-military legal authority, only to the Defence Council (i.e. to President Idi Amin).[93]

The above situation was compounded by the fact that in 1973, President Amin had substantially increased the jurisdiction of military tribunals to include the trial of civilians accused of committing capital offences.[94] This was the genesis of conferring military tribunals in Uganda with the jurisdiction to try civilians, moreover of offences that were not military in character. Hitherto, the jurisdiction of military tribunals was limited to the trial of offenders within the armed forces. The effect of extension of the jurisdiction of military tribunals was succinctly summarized by a former minister in the regime as follows:

> the setting up of military tribunals to try offences known to the Ugandan Penal Code, with power to pronounce sentence of death, has eroded the powers and prestige of the ordinary courts of law almost to extinction. The accused is not permitted to be represented by counsel of his own choice, indeed he is not represented by anyone, because, in the eyes of the regime, the lawyers are a nuisance that will not be tolerated. The taking of evidence by the tribunal is an abominable abuse of legal procedure and a denial of justice that ought to be condemned in the strongest possible

[92] As Onoria rightly notes, as result of this practice, many members of Amin's military courts acquired fancy names such as Captain Kill Me Quick, Lieutenant Colonel Butabika (locally meaning "madness") and Captain No Parking. See Onoria (1994), supra note 86.

[93] Amnesty International (1978), *Human Rights in Uganda Report*, p.4.

[94] See Decree No. 12, 1973. Section 4 gave powers to the President to order trials of civilians by military tribunals where he was satisfied that their acts were calculated to intimidate or alarm members of the public or to bring the military Government under contempt or disrepute.

> terms. Several people have been executed by firing squad on false evidence. The presiding officers of the tribunals do not possess even an elementary knowledge of the law, their only qualification is that they are trusted friends of President Amin and can be relied upon to convict whoever is unfortunate to be taken before them'[95]

Sadly, there was no remedy against the Government including members of the military tribunals for any violation of human rights and freedoms. In May 1972, the Military Government was insulated from all forms of legal sanction when President Amin signed Decree No.8 of 1972, which was to apply retroactively from 24th January 1971 until such date as the he would appoint.[96] In its very wide scope, the Decree provided that:

> notwithstanding any written law or other law, no court would make any decision, order or grant any remedy or relief in any proceedings against the Government or any person acting under the authority of Government in respect of anything done or omitted to be done for the purpose of maintaining public order or public security in any part of Uganda, or for the defence of Uganda or for the enforcement of discipline or law and order or in respect of anything relating to, consequent upon or incidental to any of those purposes, during the period between the 24th day of January 1971, and such date as the President shall appoint.[97]

In sum, it is a fallacy to talk about compliance of military justice with the right to a fair trial in general, and the right to a fair and public hearing by a competent, independent and impartial tribunal in particular during President Amin's regime. While the Constitution guaranteed this right in full measure, it was never respected in the country's military justice system. Indeed as analysed above, it was blatantly violated in all its facets. Although there is hardly any information on the administration of military justice in the first years after the overthrow of President Amin's regime in 1979, it is unlikely that the situation as regards upholding the right to a fair trial changed much. This probably confirms Oloka-Onyango's observation that the protection and enjoyment of fundamental human rights in Uganda's criminal

[95] Supra note 90.

[96] By the fall of Amin's regime in 1979, this decree was still in force.

[97] In essence, the major aim of this decree was to protect the Executive from any form of external scrutiny or sanction. As Oloka-Onyango observes, this was the high-point of President Amin's regime's fascist ideology. It secured the almost complete emasculation of judicial power and any remaining notions of constitutionalism. See Oloka-Onyango (1993), supra note 36, p.32.

justice system generally, is very much dependent on the prevailing system of governance in the country.[98] Yet, while this may be true, it should never underestimate and obscure the need to have these rights sufficiently safeguarded in the relevant legal frameworks. Although the right to a fair trial was violated with impunity during the Amin era, its protection by Uganda's Constitution and the safeguards under the 1964 Armed Forces Act could have made a big difference. In other words, the situation could have been worse.

Between April 1979 when President Amin's regime was overthrown (by the combined Ugandan exile and Tanzanian forces) and January 1986 when President Museveni's Government came to power, Uganda suffered a lot of political turmoil. Within that short period, the country went through change of Government five times. After overthrowing the Government of President Idi Amin, the Uganda National Liberation Front (UNLF) which was at the forefront in liberating the country from Amin's dictatorship installed a civilian Government with Professor Yusuf Lule as President. Hardly two months after, President Yusuf Lule was removed by the UNLF and replaced with Mr. Godfrey Lukongwa Binaisa as President. Like his predecessor, on 13 May 1980, President Binaisa was unceremoniously removed from the Presidency by the UNLF Military Commission. From this point on, the UNLF Military Commission assumed the powers of the Presidency until the December 1980 general elections which were controversially won by President Apollo Milton Obote's Party - the Uganda Peoples' Congress (UPC). President Obote II regime was overthrown through a *coup d'etat* in July 1985 which brought General Tito Okello Lutwa to the Presidency.[99] Unfortunately, there is hardly any information on how military justice was administered in these short successive Governments. It is mainly for this reason, that this study does not discuss military justice during this period. To attempt do so would be highly speculative. What is clear though, is that the 1964 Armed Forces Act remained the country's major legal framework for the administration of military justice. Whether or not its provisions were complied with, is another issue.

[98] Oloka-Onyango J (2006), "Criminal Justice, the Courts and Human Rights in Contemporary Uganda: A Perspective Analysis," *Makerere Law Journal*, Vol.1, No.1, p.22.

[99] For a detailed analysis of these unfolding political events in Uganda's history, see Omara-Otunnu (1987), supra note 2, pp.145-174.

3.2.2 President Museveni's Military Justice Under the NRA Codes of Conduct

One of the challenges that President Yoweri Museveni's National Resistance Movement (NRM) Government faced soon after it came to power was how to enforce military discipline in an army that had expanded to include the soldiers of former military regimes whose character and record as regards respect for fundamental human rights was very questionable.[100] This was critical for President Museveni as indeed he had to prove in many ways that his Government "…was not a mere change of guards but a fundamental change."[101] In order to achieve this, inter alia, his Government maintained two very strict and rigid codes viz., the Code of Conduct for the NRA[102] and the NRA Operational Code of Conduct.[103] Together, these two codes served as the blue print of the NRA Military Justice System. They were originally designed to regulate the behaviour and conduct of the NRA soldiers during its bush war against the Government of President Apollo Milton Obote. They were subsequently appended as a schedule to Legal Notice No.1 of 1986 which ushered NRM into power. Legal Notice No. 1 of 1986 modified but did not repeal the 1964 Armed Forces Act. The Act continued in operation to the extent that it was not modified by the proclamation.[104] The NRA codes had far-reaching implications for the protection and enjoyment of the right to a fair trial in Uganda's military justice system.

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[100] President Museveni's Government came to power on 26th January 1986 after a five year protracted guerilla war against the Obote II Government.

[101] During his maiden speech on 29th January 1986, President Museveni stated that his Government's capture of power was not a mere change of guards. He emphasized that NRM's mission was to bring about fundamental change in all aspects of national life. See Mukholi (1995), supra note 86, p.26.

[102] NRA was the military wing of NRM. The Code of Conduct for the NRA applied in situations when the soldiers were not engaged in field operation.

[103] The NRA Operational Code of Conduct applied in situations when the soldiers were engaged in field operations.

[104] In April 1987, Legal Notice 1 of 1986 was amended by Legal Notice No.1 of 1986 (Amendment) Decree, 1987 which substituted the schedule to Legal Notice 1 of 1986 with the one that was annexed to it. The NRA codes as comprised in the substituted schedule are the focus of the discussion in this Section. Legal Notice 1 and its amendments were for most part treated and construed as part of Uganda's Constitutional framework. See Onoria (1994), supra note 86, p.89.

As compared to the military justice system under the Armed Forces Act of 1964, military justice under the NRA Codes was an embarrassingly big setback as regards the protection of the right to a fair hearing by an independent and impartial tribunal as guaranteed by the Constitution.[105] First of all, the Code of Conduct for NRA abolished the Court Martial Appeal Court and established the General Court Martial as the supreme trial organ of the military justice system.[106] As discussed earlier, the Court Martial Appeal Court was a key area where critical reforms had taken place regarding the right to a fair trial by a competent, independent and impartial tribunal. Under the Armed Forces Act, 1964 and the regulations made thereunder, the Court-Martial Appeal Court was composed of the Chief Justice and the puisne judges of the High court, with the Registrar of High Court serving as its Registrar.[107] This was very important for guaranteeing the competence, independence and impartiality of the Court-Martial Appeal Court. Importantly, it also provided the opportunity for civilian scrutiny of the administration of justice by the military courts which, was vital for checking the excesses of such tribunals and ensuring that they complied with the law. By abolishing the Court-Martial Appeal Court, the Code of Conduct for NRA in effect negated the NRA soldiers' right of appeal and removed the country's military justice system from any scrutiny by civilian authority. This was a big setback not only in terms of ensuring fair military justice but for democracy as a whole.

Civilian authority and control of the military including military justice is now a cherished principle of democracy. Scholars like Kohn have argued that while a country may have civilian control of the military without democracy, it cannot have democracy without civilian control.[108] The HRC has also consistently stated that States must take steps to ensure that military forces are subject to civilian authority.[109]

[105] See Section 15 (1) of the 1967 Constitution of the Republic of Uganda. While Legal Notice No. 1 of 1986 suspended some parts of the 1967 Constitution, it left intact the Bill of Rights including Section 15 which provided for the right to a fair trial.

[106] See Section.10 (i) of the Code.

[107] Supra note 82.

[108]See Kohn R (1997), "How Democracies Control the Military," *Journal of Democracy*, Vol. 8, No.4, p.142.

[109] See for instance UN Human Rights Committee, *UN Human Rights Committee: Comments: El Salvador*, 18 April 1994, CCPR/C/79/Add.34, para.8, UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Lesotho*, 7 April 1999, CCPR/C/79/Add.106, para.14,

It is submitted that one of the major ways in which civilian control of the military can be achieved is by subjecting the administration of military justice to the supervision and scrutiny of the civilian courts. In this regard, as Rowe rightly put it, it can be argued that just as the armed forces must be under civilian control, the military justice system should also in the same way ultimately be under civilian control.[110] Thus in its Concluding observations to Lebanon in 1997, the HRC was concerned, inter alia, about the procedures followed by the country's military courts, "as well as the lack of supervision of the military courts' procedure and verdicts by the ordinary courts."[111]

In addition to the General Court Martial, the NRA military justice system as established by the Code of Conduct of NRA and the Operational Code of Conduct was comprised of the Field Courts Martial,[112] Unit Disciplinary Committees[113] and the Unit Tribunals.[114] The independence and impartiality of all these tribunals (if any) is highly questionable. The General Court Martial consisted of a chairman, two senior army officers, two junior army officers, one political commissar and one non-

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and UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Romania*, 28 July 1999, CCPR/C/79/Add.111, para.9.

[110] See Rowe P (2006), *The Impact of Human Rights on the Armed Forces*, Cambridge University Press, p.87.

[111] See UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Lebanon*, 5 May 1997, CCPR/C/79/Add.78, para.14.

[112] See Section 4 of the NRA Operational Code of Conduct. A Field Court- Martial was to operate in only circumstances where it was impracticable for the offender to be tried by a Unit Tribunal. It was to consist of the field commander of the operation as chairman and eight other members appointed by the deploying authority.

[113] See Section 11 (i) of the Code of Conduct for NRA. The Unit Disciplinary Committees consisted of the second in command of the Unit who would be chair; the administration officer of the Unit; the political commissar of the Unit; the regimental Sgt Major; two junior officers and one private. It had jurisdiction to try combatants below the rank of provisional junior officer II for all offences except murder, manslaughter, robbery, rape, treason, terrorism and disobedience of lawful orders resulting in loss of life. See Section 11(ii).

[114] See Section 3 (i) of the NRA Operational Code of Conduct. A Unit Tribunal was to comprise: the commanding officer of the Unit as chair; the second in command of the Unit; the administration officer of the Unit; the political commissar of the Unit; the regimental Sgt. Major of the Unit; the intelligence officer of the Unit, at least two platoon or company commanders of the Unit and one private. A Unit Tribunal had power to arrest, try and punish anybody (for any offence) to whom the Operational Code applied who was below the rank of a junior officer.

commissioned officer.[115] All the members of the General Court Martial were appointed by the High Command for a period of three months.[116] They were all eligible for re-appointment.[117] In addition, the High Command would appoint reserve members who would sit in court as observers.[118] The High Command was also responsible for appointing the prosecutor who had to be an intelligence or security officer.[119] The judge advocate and the secretary to the court (who had to be members of NRA) were personally appointed by the Chairperson of the High Command who was the President and Commander in Chief of NRA.[120]

It was a requirement for all minutes of the proceedings of the General Court Martial and Unit Tribunals to be sent to the High Command for perusal[121] and the High Command had powers to revise, quash or suspend any sentence of courts-martial.[122] In case of any disagreement arising among members of court about the construction or interpretation of any provision of the Code of Conduct for NRA and the NRA Operational Code of Conduct, or regarding the rights of anybody appearing before the court, a single arbitrator would advise the court.[123] The law was not clear on who this single arbitrator was or how he/she would be appointed. But Section 2 (ii)a of the NRA Operational Code of Conduct provided that any case involving the legal interpretation of any provisions of the Code would be referred to the High Command which would constitute itself into a court-martial for that purpose. This provision was in contradiction of Section 10 (viii) and (ix) of the Code of Conduct for NRA which stipulated that the Chairman of the High Command had to appoint at least two judge advocates from members of NRA to advise the general court martial on the law and procedure. If interpretation of the NRA Codes was the responsibility of the High

[115] See Section 10 (ii) of Code of Conduct for NRA.

[116] Ibid. The High Command was comprised of the Commander in Chief of NRA who was the chairman and eight other members who were to be appointed by the Commander in Chief of NRA. Ibid, Section 9 (i).

[117] Ibid, Section 10 (iii).

[118] Ibid, Section 10 (vii).

[119] Ibid, Section 10 (vi).

[120] Ibid, Sections 10 (viii) and (iv) respectively.

[121] Section 7 (i) of the NRA Operational Code of Conduct.

[122] Ibid, Section 9 (i).

[123] Ibid, Section 2 (ii) b.

Command, what then was the role of the judge advocates? What competence did the High Command have to interpret the law? How objective were its interpretation, given its structure and composition?

The fundamental question to pose at this point is; could such a structure and composition of Uganda's military system comply with the right to a fair trial, in particular the right to a fair hearing by a competent, independent and impartial tribunal as understood in international human rights law? As discussed in Chapter Two, the undisputed major conditions for guaranteeing independence of judicial tribunals are essentially three; security of tenure of the members,[124] financial security[125] and institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function. In *Gunes v. Turkey*,[126] the ECrtHR emphasised that in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and whether the body presents an appearance of independence. Also, as pointed out in *R v. Genereux*,[127] an individual who wishes to challenge the independence of a tribunal need not prove an actual lack of independence; rather, the question is whether an informed and reasonable person would perceive the tribunal as independent. It is clear that the general court martial as established by Code of Conduct for NRA could not pass this test. So were the other military tribunals.

First, the members of these tribunals did not enjoy any meaningful security of tenure and were not insulated from the command influence to guarantee their independence.

[124] Security of tenure requires that a judge should only be removed for a just cause, and that the cause should be subject to an independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The essence of security of tenure is tenure, whether until the age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or the appointing authority in a discretionary or arbitrary manner.

[125] The essence of financial security is that the right to salary and other financial benefits should be established by law and not subject to arbitrary interference.

[126] *Gunes v. Turkey*, Application No.31893/96, para.37.

[127] Supra note 46, p.286.

Second, the independence of the general court martial and indeed other courts-martial established by the NRA codes was compromised by the fact that the High Command (which is part of the executive) appointed both the members of court and the prosecutors. Further, the appointment of judge advocates was not done by an independent authority; it was done by the High Command which also appointed the members of court and the prosecutors. Besides, the High Command – a non-judicial body had power to vary decisions of courts-martial. The power to give a binding decision which may not be altered by a non-judicial authority is a component of the right to an independent tribunal and is inherent in the very notion of a tribunal.[128]

Perhaps the most disturbing provisions regarding the independence and impartiality of military tribunals established by the Code of Conduct for NRA and NRA Operational Code of Conduct were those contained in Sections 25 (iv) and (vi) of the latter instrument. According to Section 25 (iv), where a Unit Tribunal or Field Court Martial was found to be guilty of gross contravention of the provisions of the Code, either in substance, or procedure, the High Command would suspend such court, set up a provisional one, and all members or any one of them would be charged. As a punishment, they could be dismissed, demoted from the substantive rank and could suffer any other punishments laid down in the Code up to the maximum sentence of death. Section 25 (vi) provided that where members of a Unit Tribunal or court martial failed to execute their duty under the Code, or in any other way neglected or favored an accused, they would be charged of conspiracy and would be dismissed by the High Command and could suffer any additional punishment as the High Command would determine. Together, the above provisions constituted the most serious affront to the independence and impartiality of military tribunals under the NRA military justice system. They directly impinged on the tribunal's institutional independence from the military hierarchy and the Executive. These provisions went far beyond what is acceptable for any tribunal that purports to exercise judicial power in a democratic society.

[128] *Morris v. United Kingdom* (2002) 34 EHRR 52, para.73.

To sum it all, Uganda's military justice under the Code of Conduct for NRA and the NRA Operational Code of Conduct was a very big setback as regards the protection of the right to a fair trial. From an analytical perspective, it can rightly be concluded that what the NRA Codes of Conduct did, was to take back the country's military justice system, as far as guaranteeing the right to a fair trial is concerned, to the pre -1958 traditions.

3.2.3 From Museveni's NRA Codes of Conduct to the NRA Statute 1992: Old Wine in New Bottle?

In 1992, the NRA Statute 1992 (which later became the UPDF Act 1992),[129] was enacted by the National Resistance Council (NRC)[130] to replace the two NRA Codes of Conduct and the 1964 Army Act as Uganda's major legal framework governing the country's armed forces and therefore issues of military justice. As it is not intended to discuss military justice under the NRA Statute in any detail for the reasons given at the beginning of this Chapter,[131] it is important to highlight just a few pertinent issues at this point regarding this law as we proceed towards analysing compliance of Uganda's current military justice legal framework with the right to a fair trial.

First, the NRA Statute 1992 did not introduce any significant reforms in the area of military justice, especially as far as guaranteeing the right to a fair trial (in particular the right to a fair and public hearing by a competent, independent and impartial tribunal) is concerned. This law retained many aspects of the disgraceful NRA Codes of Conduct whose provisions regarding military justice as discussed above, fell far

[129] This change in title was as a result of the change in name of Uganda's military forces from the NRA to UPDF.

[130] The NRC was established by Legal Notice No. 1 of 1986 which established the legality of President Yoweri Museveni's NRM Government. This legal instrument which became part of Uganda's Constitution vested the legislative powers in the NRC and the President. The NRC was therefore Uganda's Parliament in the first years of the NRM rule. It was initially comprised of thirty-eight leading cadres of the NRM and NRA who became members by virtue of their service to NRM during the guerilla war against the Government of President Apollo Milton Obote. For a succinct history of the Parliament of Uganda, see the Parliament website i.e. http://www.parliament.go.ug/index.php?option=com_content&task=view&id=4&Itemid=3 [Accessed on 1 April 2011].

[131] See the second paragraph of this Chapter.

below the acceptable minimum international human rights standards for the administration of justice embedded in the right to a fair trial. This is however not so surprising because during the parliamentary debates leading to the enactment of this law, Major General David Tinyefuza, the Minister of State for Defence at the time, had pointed out clearly when introducing the NRA Bill for the Second Reading, that the Bill was intended among other things to make "…*provision for the maintenance of enhanced discipline in the armed forces by retaining the Code of Conduct and the Operational Code of Conduct."*[132] Hon. Mrs. Njuba, a historical member of the NRA made the point even clearer when she informed members of the NRC that actually "the origins of the NRA Bill were in the desire to legalise the two Codes of Conduct of NRA."[133] Given that the NRC was mainly comprised of ardent supporters of NRM including senior military officials, it came as no big surprise when at the end of it all, the NRA Bill was passed into law without any significant changes.

A reading of the record of the parliamentary debates that took place regarding this law also gives the impression that members of the NRC were not generally cautious about human rights issues like the need to protect the soldiers' right to a fair trial.[134] There were hardly any submissions during these debates that were based on or made reference to the country's international human rights obligations regarding the right to a fair trial. This is notwithstanding the fact that at least by this time, Uganda had ratified the African Charter. But yet even if Uganda had not ratified the African Charter, it was still obliged to protect the right to a fair trial as an obligation at customary international law. As discussed in Chapter Two, many aspects of the right to a fair trial are also principles of customary international law which generally binds all states.

The NRA Statute like its predecessor (i.e. the NRA Codes of Conduct) was too harsh. In fact, during the parliamentary debates that took place regarding this law, many members of the NRC expressed concern about the harshness of the NRA Bill which unfortunately was passed into law without any significant changes. In particular, they

[132] See The Republic of Uganda, Parliamentary Debates (Hansard) Official Report, Fifth Session 1991-1992, Issue No. 21, p.116. Emphasis added.

[133] Ibid p.163.

[134] See generally the Parliamentary Debates Official Report, supra note 132.

were concerned with the number of times where the Bill provided for the death penalty as a sentence for those found guilty of committing certain offences. Hon. Karuhanga for instance observed thus "I randomly opened the Bill and on page 14 and 15, I found that at the conclusion of every section, suffering death is the punishment. Now, on just two pages, there are four times you can die in this Bill. To me, it seems that the Bill has been brought so that we finish our soldiers…"[135] Arguing that the Bill was "terribly harsh," Hon. Kisamba Mugerwa observed that in total, there were 54 incidences in the Bill where a soldier could die. He argued that at that rate, Uganda could soon find itself without any body in the army.[136]

On the other hand, Government and the military leadership justified the harshness of the NRA Bill and indeed the retention of the NRA Codes of Conduct on ground that such harshness was critical for the maintenance of military discipline. It was argued that since the harshness underlying the NRA Codes of Conduct had proved efficient in maintaining discipline during the NRA guerrilla war and first five years of NRM in power, there was no need to change the status quo.[137] It can thus be concluded that the

[135] Ibid, p.119.

[136] Ibid.

[137] See for instance generally the submissions of members like Major General David Tinyefuza, Mrs. Njuba, Lt. Col. Jeje Odongo and Major General Elly Tumwine. It is worth noting that of all the army officials representing the NRA in the NRC, it was only Brigadier Kyaligonza who opposed and criticized the NRA Bill as being too harsh. He argued that many of the provisions were a replica of the NRA Codes of Conduct which were only relevant in the NRA bush guerilla war. "I would hate to be reminded of some of the famous executions which have taken place, because of the undefined law," he lamented. Ibid, p.124. Unfortunately, on a point of order raised by Major. General Tinyefuza, Brigadier Kyaligonza was ruled out of order on the erroneous grounds that as a historical member of the NRC, who was also a member of the Army Council and the NRA High Command which had passed the NRA Bill before sending it to the Cabinet and to the NRC, he was estopped from objecting to its provisions without informing the said authorities. Ibid. This was despite his spirited argument that his views were representative of the NRA which he was representing and that as he rightly put it "when I am in this House... I am free to discuss and deliberate – the Bill could have been passed in the Army Council but I may not have been in total support, now I have given my opinion rejecting the contents and, therefore, me being a Historical member and a member of the High Command does not deter me from elaborating my point as a legislator, especially, to this House. Especially to this House where we are going to pass the Bill concerning our own citizens both civilian and our own sons, the army men and officers…" Ibid. Disappointingly, but perhaps not surprising, the following day, Brigadier Kyaligonza withdrew all

NRA Statute of 1992 was nothing but old wine in new bottle, at least as far as ensuring compliance of Uganda's military justice with the right to a fair trial is concerned.

Starting in early 2000, members of the Uganda legal fraternity organized under their umbrella organisation - the Uganda Law Society (ULS) started challenging the constitutionality of several provisions of Uganda's military law including those that had a direct bearing on the right to a fair trial. Some of the decisions of court in these cases call into question the Courts' role as guarantors and defenders of peoples' rights. With regard to challenging the constitutionality of the NRA Statute, there are mainly two cases worth highlighting here. One such case is *Uganda Law Society v. Attorney General*.[138] The applicants (ULS) sought, inter alia, to challenge the constitutionality of the NRA Statute 1992 insofar as it provided for the passing of a death sentence without the right of appeal to the Supreme Court. The application sought for an injunction to restrain the State from carrying out the death sentences passed by the field court martial until the petition was heard. The Attorney General argued that Article 22 (1) of the Constitution[139] did not apply to decisions passed by the field court martial because it was not a court of judicature and that even if it was, by virtue of Article 137 (5)[140] and 121[141] of the Constitution, Article 22 (1) was never

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his submissions against the Bill, stating that on a point of procedure, he ought to have raised them in the Army Council and the High Command. Ibid, p.130. One may not help but to imagine the pressure under which Brigadier Kyaligonza acted in withdrawing his submissions. It might be that minus the withdrawal, his next destination would have been court-martial. After all, his submissions could amount to "acts prejudicial to discipline and good order in the army" contrary to the Army Act and the NRA Codes of Conduct.

[138] *Uganda Law Society v. Attorney General*, Constitutional Application No.7/2003.

[139] This provision states that no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. This provision means therefore that in Uganda, all convictions and sentences involving death have to be confirmed by the Supreme Court which is the highest appellate court.

[140] This Article provides that where any question as to the interpretation of the Constitution arises in any proceedings in a court of law other than a field court martial, the court - a) may, if it is of the opinion that the question involves a substantial question of law; and b) shall, if any party to the proceedings requests it to do so, refer the question to the Constitutional Court for decision in accordance with Clause (1) of Article 137. Article 137 (1) of the Constitution provides that any

intended to apply to field courts martial. The Constitutional Court held that the primary objective of field courts-martial was to administer instant justice and instill discipline among the men and women in the armed forces at the front line and that to that extent; it could not be bogged down by appeal procedures. The court held further that the Constitution regarded field courts-martial as special courts which were established to maintain law and order and military discipline in a field operation, where to employ the normal court structures would create problems for the field commander. It argued that although death was an end to everything, it had to be balanced with the higher objectives the punishment was intended to achieve. That the necessity for the death sentence in a field operation cannot be underestimated for in a field operation, tough decisions and actions are a *sine quo non.* The court held therefore that on a balance of convenience, it was not proper to suspend the operation of the provisions which permitted the field courts-martial to pass death sentences without the right of appeal to the Supreme Court.[142]

With great respect to the Constitutional Court, that a court which is specifically charged with interpreting and upholding the Constitution chose to defend the military's objective in having the death sentence, at the expense of the accused persons' constitutionally guaranteed right of appeal was quite disappointing. As guarantors and defenders of peoples' rights and freedoms, courts are expected to interpret provisions that seek to curtail the internationally and constitutionally guaranteed rights very restrictively. In the converse, they are expected to interpret provisions guaranteeing fundamental human rights and freedoms broadly and purposively. The Constitutional Court failed disappointingly in this noble duty. Instead, the Court acted, more executive-minded than the executive by upholding the

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question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court.

[141] This provision deals with the issue of Prerogative of Mercy. The essence of it is that on advice of the Advisory Committee on the Prerogative of Mercy, the President may grant to any person convicted of an offence a pardon or a respite or substitute the punishment imposed with a less severe form of punishment. Article 121 (6) states however that " a reference in this article to conviction or imposition of a punishment, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a court martial or other military tribunal except a field court- martial."

[142] For a further scholarly over view of court's decision in this case, see, Oloka-Onyango (2006), supra note 98, pp. 42-43.

military necessity's objective in having death sentences at the expense of the accused persons' right of appeal. As emphasised by Justice Ginsburg in the United States Supreme Court of *Weiss v. United States,*[143] "[I]t is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated as honored members of society whose rights do not turn on the charity of a military commander. . . . A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution . . . ."

Praiseworthy however, in its recent decision of 5th February 2009 in the case of *Uganda Law Society and Another v. The Attorney General,*[144] the Constitutional Court departed from its disappointing decision summarised above. This case involved two soldiers of the UPDF who were indicted, tried by a field court martial and executed on the same day for the murder of three civilians in Kotido district in North Eastern Uganda. The petitioners filed two applications seeking declarations that the entire process was unconstitutional. They invited the court to, inter alia, revisit its decision in *Uganda Law Society v. Attorney General* discussed above. Delivering the unanimous decision of the Constitutional Court, Justice Twinomujuni held that the right of appeal applies even to the decisions of the field courts-martial. Citing Justice Mulenga's decision in the Supreme Court case of *Attorney General v. Tumushabe,*[145] Justice Twinomujuni correctly stated that except where the Constitution expressly exempts application of an article to any person or authority, the Constitution applies

[143] *Weiss v. United States*, 510 U.S. 163 (1994).

[144] *Uganda Law Society and Another v. The Attorney General*, Constitutional Petitions No. 02 of 2002 and 08 of 2002.

[145] *Attorney General v. Tumushabe*, Constitutional Appeal No.3 of 2005. In this case, Justice Mulenga delivering the unanimous judgment of the Supreme Court held inter alia that "But more significantly, I should stress that the Constitution guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in the circumstances that are expressly stipulated in the Constitution. The Constitution also commands the government, its agencies and all persons, without exception, to uphold those rights. The General Court Martial is not exempted from the constitutional command to comply with the provisions of Chapter 4 or of article 23(6) in particular, nor is a person on trial before a military court deprived of the right to reclaim his/her liberty through the order of habeas corpus or application for mandatory bail in appropriate circumstances."

to all. It is remarkable that Justice Twinomujuni grounded his decision in regional and international human rights law. He argued as thus

> At the trial of this appeal, both counsel for the petitioners and the respondent appeared to accept the argument that the UPDF Act does not provide for a right to appeal against the decision of a Field Court Martial. I am unable to tell precisely how they came to that conclusion. However, from the submissions of counsel Philip Karugaba, I hold the view that the impression emanated from the fact that section 78 of the UPDF Act, 1992 which created the Field Court Martial and gave it powers did not state that a decision of that court could be appeallable. It is said that there is no right of appeal as such unless that right has been specifically created by the relevant statute. This means that where a Statute grants a jurisdiction to a court, then unless the Statute states that a person aggrieved by a decision of such a court can appeal, then there is no right of appeal. This further means that there is no automatic right of appeal. *This is frequently asserted in our courts as if we forget that the African Charter on Human and Peoples Rights [Banjul Charter] which was adopted on 27th June, 1981 by the OAU and which came into force on 21st October, 1986 is part and parcel of our Constitution*. This is so by virtue of article 287 of the Constitution which states…"[146]

Quoting Article 7 (1) (a) of the African Charter which provides that every individual has "the right to an appeal to competent national organs against acts of violating fundamental rights as recognised by conventions, laws, regulations and customs in force," Justice Twinomujuni held that by virtue of Article 45 of the Constitution,[147] individuals have an automatic right of appeal where their fundamental rights and freedoms have been violated. He therefore held that a denial of that right was clearly unconstitutional and that the accused persons in the Kotido trial were entitled to the right to life as guaranteed under Article 22(1) of the Constitution. Justice Twinomujuni also clarified many other issues regarding the constitutionality of the current military justice system under the UPDF Act, 2005. These will accordingly be analysed in Chapter Four of this thesis. Suffice to point out here that this case is a land mark in many ways as far as Uganda's court jurisprudence on issues of military justice, human rights and the law is concerned.

[146] Supra note 144, para.5. Emphasis added.

[147] Article 45 of the Constitution states that "the rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned."

3.3 Conclusion

In this Chapter, we set out to analyse the historical foundation/origins and evolution of Uganda's military justice system especially as it relates to the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. From the fore going analysis, it is clear that the origins of Uganda's military justice were British. As a colony, all Uganda's early military justice legal frameworks were passed by the British Parliament. These military laws like was the case with many countries (including the colonial powers) at the time, were less concerned with issues of justice and human rights.

The notion of the right to a fair trial as it is understood in the modern human rights discourse was largely nonexistent in Uganda's military justice system during the colonial times. The military ordinances in the colonial times vested all but dictatorial and arbitrary powers in the persons of the commanding officers. It was the commanding officers who had the authority to proffer charges against accused soldiers and they generally participated in the investigations. The power to convene courts-martial including appointment of the members and the presidents of such courts also vested in the commanding officers. The law did not prohibit the commanding officers from appointing members of the courts-martial who were subordinate to them in rank. In fact, it is probable that in most cases, this is what happened in real practice. In other cases, the law actually allowed the commanding officers to preside over the courts-martial they had convened. The commanding officers also had the power to confirm the findings and sentences of courts-martial. Such arrangement of Uganda's military justice system in the colonial period could not definitely guarantee the independence and impartiality of the military courts.

The military justice laws in the colonial period were also quiet about several other aspects of the right to a fair trial as it is understood in human rights law. For instance, they did not require military courts to be legally competent. Nor was there any provision requiring the proceedings of military courts to be public. In fact, it is plausible to argue that Uganda's military courts during the colonial era were not tribunals in the real sense of the word as it is understood in international human rights law but were just mere ad hoc establishments whose real purpose was to help the

commanding officers achieve their objectives under the guise of administering military justice.

The above notwithstanding, by the end of the colonial era, Uganda's military justice had started improving as far as guaranteeing the right to a fair trial was concerned. For instance, the 1958 Military Forces Ordinance contained several provisions that were aimed at guaranteeing the right to a fair trial. For example, it provided that officers who convene courts-martial could not be members of those courts and that the accused soldiers had the right to object to any member of court, including the president. As a way of improving on the competence of courts-martial, provision was made for the appointment of judge advocates to advise these courts on issues of law and procedure. The law also provided for the right of appeal to a civilian court, i.e. the High Court, thus setting in motion the process of "civilianisation" of military justice which was critical for ensuring civilian control and scrutiny of courts martial to ensure that they did not abuse their powers.

Uganda's immediate post-independence military justice system under the 1964 Army Act even improved the country's military justice further in as far as guaranteeing the right to a fair trial is concerned. For instance, it established the Court Martial Appeals Court as the last appellate court on issues of military justice. This court was constituted of the Chief Justice and all the puisne judges of the High Court, with the Registrar of the High court serving as its Registrar. The 1964 Army Act also vested the authority to appoint judge advocates in the office of the Chief Justice. This was critical for not only guaranteeing that the persons appointed judges were competent but also for ensuring their independence from the convening authorities of courts martial and the general army command influence.

Disappointingly, Uganda's military regimes starting with the infamous bloody Amin era blatantly violated most of the above and other progressive provisions of the 1964 Army Act which guaranteed the right to a fair trial. As discussed, Amin's military justice system was a complete travesty of all the minimum acceptable international human rights standards for the administration of justice in any democratic society. The regime kept tight control of the military justice system whose courts-martial were composed of illiterate men whose only basis of appointment was friendship and personal loyalty to Amin and the fact that they could be relied on to convict whoever

the military regime wanted convicted. In many instances, Amin's military tribunals proceeded on the premise that accused persons were guilty as charged and that the onus was on them to prove their innocence. The right to a fair trial within a reasonable time was understood to mean instant (in)justice and on conviction, the tribunals had an almost standard penalty, i.e. death by firing squad. To make matters worse, there was no right of appeal from Amin's military tribunals to a non-military legal authority. Only appeals to the Defence Council which in essence was President Amin himself were permissible. The country's military justice system most likely remained in this abominable and precarious state even after the overthrow of President Amin until President Museveni came to power in 1986.

Instead of reforming the administration of military justice to ensure that it complies with the minimum international standards for administering justice as was expected, President Museveni's military justice under the NRA Codes of Conduct which substantially modified the 1964 Army Act, just legitimized the denial and indeed the violation of the internationally guaranteed right to a fair trial. The NRA Codes of Conduct were an embarrassingly big setback in as far as guaranteeing the right to a fair trial in Uganda's military justice system is concerned. Like Uganda's military courts during the colonial times and Amin's military tribunals, courts martial established under the NRA Codes of Conduct were neither competent nor independent. Neither could they be said to have been impartial. They were comprised of serving military officers subject to the command influence and who almost did not enjoy any security of tenure or financial security. Members of these courts were appointed by the High Command for a period of three months subject to renewal. The High command which appointed the members of court also had the powers to appoint the presidents of these courts, the prosecutor, the judge advocate and the secretary. Almost all the persons appointed to these offices had to be serving military officers. If the NRA High Command found members of courts-martial guilty of "gross contravention of the NRA Codes of Conduct," or "favoring an accused," they could be charged of conspiracy, dismissed and could suffer other punishments including death. The NRA High Command, a non-judicial body, had the power to revise, quash or suspend decisions of court martial. To crown it all, like it happened with Amin's military justice, the NRA Codes of conduct abolished the Court Martial Appeal Court

thus effectively denying the military personnel any right of appeal and removing the country's military justice system from any civilian scrutiny and control.

In totality, the effect of the NRA Codes of Conduct in as far as protecting and guaranteeing the right to a fair trial in Uganda's military justice system is concerned, was to take back the system to the pre 1958 traditions. In fact, military justice under the NRA Codes of Conduct was more punitive in other respects than the military justice under the legal frameworks of the colonial times. Unfortunately, the NRA Statute 1992 which repealed and replaced the NRA Codes of Conduct retained much of the essence of the infamous Codes.

Thus, despite attempts at reform, by 1992, Uganda's military justice system was in essence still largely stuck in its origins and was still far from complying with the minimum acceptable international standards for the administration of justice embedded in the right to a fair trial. It is from this background that we now proceed to examine the compliance of Uganda's current military justice system with the right to a fair trial, in particular, the right to a fair and public hearing by a competent, independent and impartial tribunal.

CHAPTER FOUR

UGANDA'S CURRENT MILITARY JUSTICE SYSTEM AND THE RIGHT TO A FAIR TRIAL

In Chapter Three above, it was established that despite attempts at reform, by 1992, Uganda's military justice system was very far from complying with the country's international human rights obligations as far as the right to a fair trial is concerned. The extent, to which Uganda's current military justice complies with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal, is the major focus of this Chapter. The analysis provides a critical examination of Uganda's current military justice legal framework. As Decary J rightly emphasised, in examining the compliance of certain aspects of military justice with human rights standards, "...legislative and regulatory provisions speak for themselves and if they are prima facie an infringement of the rights guaranteed… no further evidence is necessary."[1] But before analysing the extent to which Uganda's current military justice complies with the right to a fair trial, it is essential to first explore, briefly, what the concept of compliance with international norms entails.

4.1 The Concept of Compliance with International Norms

The gap between the international recognition of human rights and their national and local level implementation and compliance is the most problematic aspect of the international effort to ensure universal respect for human dignity.[2] As Mugwanya rightly argues, the basic challenge facing the human rights movement therefore is to close this gap to make human rights meaningful in peoples' lives.[3] The question of compliance with international human rights norms is therefore of critical importance for the effective realisation and enjoyment of the protected rights and freedoms. But what does compliance with international norms (such as the international human rights norms) entail? Why do states comply with international norms and in other cases fail or refuse to abide by them even when they are obliged to do so? What

[1] *R v. Genereux* (1990) 5 C.M.A.R. 38, p.59.

[2] Mugwanya, GW (2003), *Human Rights in Africa: Enhancing Human Rights Through the African Regional Human Rights System*, Transnational Publishers, Inc, Ardsley, p.4.

[3] Ibid, p.5.

factors can help to improve states' compliance with their international obligations? These are some of the major questions that the concept of compliance with international norms attempts to answer.

In addressing these questions, it is always important to distinguish between two interrelated aspects i.e. implementing international norms (especially where a treaty is involved) and complying with such norms. There is general consensus in academic scholarship that the two concepts do not mean the same thing. Implementation generally refers to the measures that states undertake to give effect to international agreements,[4] including legislative measures. From this perspective therefore, implementation of international agreements does not necessarily mean compliance with the norms that those agreements espouse. However, where a human rights treaty provides, as, for example, in Article 2 (2) of the ICCPR that: "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant," then implementation of the provision will automatically transform to compliance, because compliance in that case requires only that the treaty be put into domestic law.

But generally, compliance goes beyond implementation, and refers in particular to whether countries in fact adhere to the provisions of the accord and to the implementation measures that they have instituted.[5] Compliance therefore involves the actual behaviour of states, in particular whether it conforms to the prescribed behavior.[6] It involves examining state behavior and other measures governments undertake in addition to their formal step of implementing the particular international

[4] Jacobson HK and Weiss EB, "A Framework for Analysis," in Weiss EB and Jacobson HK (Eds) (2000), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, The MIT Press, Cambridge, p.4. See also Burgstaller M (2005), *Theories of Compliance with International Law*, Martinus Nijhoff Publishers, Leiden, p.4.

[5] Jacobson and Weiss, ibid.

[6] Young O (1979), *Compliance and Public Authority: A Theory with International Application*, Johns Hopkins University Press for Resources for the Future, Baltimore, pp.2-3.

agreement.[7] In this respect, it is important to emphasise that this Chapter is mainly concerned with the extent to which Uganda's military justice legal framework conforms to the international human rights norms of the right to a fair trial. It does not deal with compliance in its full technical sense as highlighted above. It needs no emphasis to point out the fact that once the national legal framework(s) for implementing the international norms is inconsistent with the relevant norms, there can hardly be any compliance (in its technical sense) with such norms as is well reflected in the observation of Decary J, earlier quoted above. Indeed from this perspective, it is plausible to argue that implementation is perhaps the most important step towards ensuring compliance with international norms. In many ways, it determines the extent to which compliance will actually be achieved. If the different legal and policy measures adopted to conform to international norms are noncompliant, there is little actual compliance that can be expected. That is why this thesis focuses mainly on the question of conformity of Uganda's military justice legal framework with the right to a fair trial.

Regarding the reasons why states comply with international norms, it is apparent that it does not necessarily follow that because a state is party to an international agreement, it will therefore comply with the provisions of that instrument. Although by virtue of their consent, states are technically obliged to comply with their treaty obligations,[8] the fact is that the legal obligation in itself does not provide an incentive structure sufficient to foster compliance.[9] Indeed in the area of human rights, as Moore rightly observes, despite the dramatic increase in the number of human rights treaties over the years, noncompliance remains prevalent.[10] Henkin's assertion that "almost all nations observe almost all their obligations almost all of the time"[11] is therefore contestable, at least as far as compliance with international human rights instruments is concerned.

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[7] Burgstaller (2005), supra note 4.

[8] See Art 26 of the Vienna Convention on the Law of Treaties 1969.

[9] Burgstaller (2005), supra note 4.

[10] Moore DH (2003), "A Signaling Theory of Human Rights Compliance," *Northwestern University Law Review*, Vol.97, p.879.

[11] Henkin L (1979), *How Nations Behave: Law and Foreign Policy*, 2nd Edition, Columbia University Press, New York, p.47.

There are a number of theories that have been advanced to explain what motivates states to comply with or deviate from complying with their international obligations. These can be categorised into five main theories viz., the rational choice theory advanced by the rationalists, the managerial model theory propounded mainly by the Chayeses, the rule legitimacy theory, Koh's transnational legal process theory, and the liberalists' theory of compliance. A critical aspect to note about most of these theories, if not all, is that they reject the assertion that coercion alone per se plays any significant role in ensuring states' compliance with their international obligations. The Chayeses and Mitchell for instance argue that in case of noncompliance, coercive sanctions are not only ineffective but are inherently unsuitable.[12] They contend that states face high political and economic costs at home and collective-action-type difficulties in building international coalitions among other challenges.[13] They therefore conclude that efforts to negotiate and include coercive sanction clauses in treaties and to invoke sanctions are largely a waste of time.[14]

According to the rationalists like Abbot,[15] and Goldsmith and Posner,[16] states comply with norms of international law not so much because they feel morally or legally obligated to do so, but because it serves their short and long term interests to do so. It is argued in this regard that as the major players at the international scene, states employ different cooperative and coordinated strategies to pursue a complex, multifaceted long-run national interest, in which compliance with negotiated legal norms serves as a winning strategy for all. Arguing from the customary international law perspective, Goldsmith and Posner for instance contend that states' compliance with international law is as a result of an epiphenomenal result of convergence of their

[12] See Chayes A, Chayes AH and Mitchell RB, "Managing Compliance: A Comparative Perspective" in Jacobson and Weiss (2000), supra note 4, p.41.

[13] Ibid.

[14] Ibid.

[15] See generally, Abbot KW (1989), "Modern International Relations Theory: A Prospectus for International Lawyers," *Yale Journal of International Law*, Vol.14, No.2, pp.335-411. See also Abbot KW (1985), "The Trading Nation's Dilemma: The Functions of the Law of International Trade," *Harvard International Law Journal*, Vol.26, No.2, pp.501-532.

[16] See generally Goldsmith JL and Posner EA (1999), "A Theory of Customary International Law," *University of Chicago Law Review*, Vol.66, No.4, pp.1113-1178.

interests with the norms of international law.[17] They argue that compliance with international law is as a result of patterns of behaviour of states resulting from the pursuit of self-interest under four behaviour logics: coincidence of interest, coercion, cooperation, and coordination.[18]

On their part, the Chayeses who are the main architects of the managerial theory of compliance argue that the main mechanism for maintaining compliance with treaties at acceptable levels is the "…iterative process of discourse among the parties, the treaty organisation and the wider public."[19] According to this approach, to the extent that treaties generally reflect the interests of the states party, and taking into consideration the norms they enunciate and the question of efficiency, there is a general "propensity to comply."[20] But the actual level of compliance depends on the iterative process of discourse among the parties, the treaty organisation and the wider public thus the managerial theory of compliance. According to this theory, there are three main reasons that explain noncompliance especially where it is not deliberate i.e. ambiguity and indeterminacy of the treaty language; limitations on the capacity of parties to carry out their undertakings; and the temporal dimension of the social, economic, and political changes contemplated by regulatory treaties.[21] In order to address these deficiencies, the Chayeses advocate for a sophisticated integrated management strategy that addresses the causes of noncompliance. This includes effective participation in the treaty regime, ensuring transparency, dispute settlement, capacity building and persuasion.[22]

The legitimacy-oriented theorists led by Thomas Franck contend that states comply with international norms when they perceive the norms and their institutional penumbra to be legitimate.[23] They define legitimacy as "a property of a rule or rule-

[17] Ibid, pp.1114-1115.

[18] Ibid.

[19] Chayes A and Chayes AH (1995), *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge, p.25. See also Chayes A, Chayes AH and Mitchell RB (2000), supra note 12.

[20] Chayes A and Chayes AH (1995), ibid, p.4.

[21] Ibid, p.10.

[22] Ibid, pp.22-25.

[23] Franck TM (1990), *The Power of Legitimacy Among Nations*, Oxford University Press, Oxford, p.25.

making institution which itself exercises a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[24] According to the legitimacy theorists, the more states perceive a norm to be legitimate, the more likely they will comply with that norm. In this respect, it is argued that the concept of legitimacy contributes to norm compliance by providing an "internal" reason for the states to follow the norm.[25] Where the state believes a norm to be legitimate, it is argued that compliance is neither motivated by fear of retribution or coercion, nor self-interest; rather, it is motivated by an internal sense of obligation.[26]

Criticising the legitimacy-oriented theorists and the Chayeses' managerial theory, Koh argues that their accounts of the compliance story omit "a thoroughgoing account of *transnational legal process*: the complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by the domestic legal systems."[27] He points out that the transnational legal process describes the theory and practice of how public and private actors – nation-states, international organisations, multinational enterprises, non-governmental organisations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.[28] In his view, it is this transnational legal process of interaction, interpretation and internalization of international norms into domestic legal systems which is pivotal to the understanding of why nations "obey" international law.[29] It describes the pathways whereby a "managerial" discourse or "fair" international rule penetrates into a domestic legal system, thus becoming part of

[24] Ibid, p.24.

[25] Burgstaller (2005), supra note 4, p.91.

[26] Ibid.

[27] Koh HH (1997), "Why Do Nations Obey International Law?" *Yale Law Journal*, Vol.106, No.8, p.2602. See also generally Koh HH (1996), "Transnational Legal Process," *Nebraska Law Review*, Vol.75, No.1, pp.181-208.

[28] Koh (1996), ibid, pp.183-184.

[29] Koh (1997), supra note 27, p.2603.

that nation's internal value set. In this way, the evolutionary process of repeated compliance gradually becomes habitual obedience, argues Koh.[30]

Finally, the liberal theorists argue that the level of states compliance with international norms is not determined at a systemic level, but the level of domestic structure. They posit that individuals and groups acting in domestic and transnational civil society are the primary actors in the international system.[31] According to the liberalists, states are nothing but agents of the individuals and groups in the domestic and transnational society. Accordingly, they contend that it is the pressure that the individuals and groups exert on the state through the domestic political institutions which determines the extent to which a particular state will comply with international norms.[32]

Although all the theories of compliance explored above have their own merits, each of them has gaps. None of them can singly offer a complete explanation of the reasons why states comply and sometimes fail or refuse to comply with international norms. In order therefore to fully understand the concept of compliance, recourse has to be made to all the above-highlighted theories. But depending on the circumstances of a particular case, one, two or more theories may suffice to explain the incident of (non)compliance.

Specifically regarding the reasons for noncompliance of Uganda's military justice legal framework with the right to a fair trial, it is plausible to argue (especially going

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[30] Ibid.

[31] Slaughter A (1994), "The Liberal Agenda for Peace: International Relations Theory and the Future of United Nations," *Transnational Law & Contemporary Problems*, Vol.4, No.2, pp.397-400. See also generally Slaughter A (1995), "International Law in a World of Liberal States," *European Journal of International Law*, Vol.6, No.1, pp.503-538.

[32] Slaughter (1994), ibid. The liberal school of thought is distinguishable from constructivism. The latter, as mainly an approach to the study of international institutions, stresses the role that international organisations play and should play in fostering knowledge and understanding, which help and empower individuals and groups in the domestic and transnational society to influence and shape state behavior and actions. For a very good analysis of constructivism and quasi-constructivism, see Okafor OC (2007), *The African Human Rights System: Activist Forces and International Institutions*, Cambridge University Press, Cambridge.

by the parliamentary debates preceding the enactment of the UPDF Act, 2005 and its predecessor- the UPDF Act, 1992) that the inadequate awareness by the Members of Parliament about the nature and scope of the country's international human rights obligations could be one of the main factors.[33] A critical analysis of the relevant Hansards hardly shows any reference to Uganda's international human rights obligations let alone the constitutional provisions concerning the right to a fair trial. In fact, in some cases as the analysis in Section 4.4 will reveal, Members of Parliament made submissions that were clearly contrary to the right to a fair trial as understood in international human rights law. That is why, inter alia, a thesis of this nature becomes critical to help inform future debates on the question of military justice in Uganda.

Now that the concept of compliance with international norms has been examined, it is apt to start analysing the compliance of Uganda's current military justice legal framework with the right to a fair trial. In doing this, it is necessary to first of all, examine the current Ugandan constitutional framework for right to a fair trial. This is the major focus of Section 4.2 below.

4.2 The Ugandan Constitutional Framework for the Right to a Fair Trial

Perhaps the most important starting point in analysing the constitutional framework for the right to a fair trial in the administration of military justice is Article 2 of Uganda's Constitution of 1995.[34] This provision emphatically states that the Constitution is the supreme law of Uganda and that it has binding force on all authorities and persons throughout the country.[35] According to Article 2 (2), if any law or custom is inconsistent with any of the provisions of the Constitution, the Constitution prevails and such law or custom is rendered void to the extent of the inconsistency. Emphasising the supremacy of the Constitution in his concurring

[33] It is recognised that in addition, there must be other political, social, economic and cultural factors that account for the noncompliance of Uganda's military justice legal framework with the right to a fair trial. Although exploring these factors is outside the scope of this thesis, the theories of compliance analysed above provide an important starting point for any inquiry into such factors.

[34] The 1995 Constitution of the Republic of Uganda is Uganda's fourth Constitution since independence. It was adopted and enacted into law on the 22nd day of September 1995. It came into force on 8th October, 1995. Article 288 repeals the 1967 Constitution and Legal Notice No.1 of 1986.

[35] Article 2 (1).

judgment in *Attorney General v. Joseph Tumushabe*,[36] Bart Katureebe, Justice of the Supreme Court of Uganda, observed that the arguments of the appellants that the provisions of the Constitution regarding the right to bail were not applicable to the General Court Martial in particular and courts-martial in general were based on wrong premises and were untenable"[37] He stressed that the Constitution is the supreme law of Uganda with binding force on all authorities and persons throughout the country including courts-martial.

In *Uganda Law Society & Another v. The Attorney General,*[38] citing Article 2 of the Constitution, Justice Twinomujuni delivering the unanimous decision of the Constitutional Court,[39] also re-affirmed the Constitution as the supreme law of Uganda with binding force on all authorities including military tribunals. He stated thus:

> In the course of my eleven years service as a justice of the Constitutional Court, I have heard very senior representatives of the Attorney General argue that the Constitution does not apply to the Uganda Peoples Defence Force as it applies to other authorities and persons in Uganda. They particularly like to argue that the Constitution does not apply to the military courts martial because the Courts are not Courts of judicature within the meaning of Article 129 of the Constitution. They argue that these are special institutions that were never intended to be bound by stringent rules and procedures laid down in the Constitution. I have always held that this argument is fallacious. The majority of Justices of this Court have always maintained that the Constitution applies to all authorities and persons throughout Uganda. I was, therefore, shocked to hear the same arguments being advanced in this petition by counsel for the respondent.[40]

It is therefore clear that Uganda's highest court i.e. the Supreme Court and the court specifically charged with the responsibility of interpretation of the Constitution i.e.

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[36] *Attorney General v. Joseph Tumushabe*, Constitutional Appeal No.3 of 2005 [2008] UGSC 9 (9 July 2008). Unpublished judgement (on file). Available at: http://www.ulii.org/ug/cases/UGSC/ [Accessed on 1 April 2011].

[37] Ibid, p.10.

[38] *Uganda Law Society & Another v. The Attorney General*, Constitutional Petitions No. 02 of 2002 and 08 of 2002. [2009] UGCC 1 (5 February 2009). Unpublished judgment (on file). Available at: http://www.ulii.org/ug/cases/UGCC/ [Accessed on 1 April 2011].

[39] The Constitutional Court is Uganda's Court specifically mandated with the responsibility of interpreting the Constitution. See Article 137 (1) of the Constitution.

[40] Supra note 38, para.4 (A), pp.8-9.

the Constitutional Court, have unequivocally pronounced themselves on the fact that the Constitution as the supreme law also binds military tribunals in the administration of military justice.

Uganda's Constitution like many constitutional frameworks in other countries contains an extensive Bill of Rights. The Bill of Rights in Uganda's Constitution is contained in Chapter Four which deals with the protection and promotion of fundamental and other human rights and freedoms. It is provided that the fundamental rights and freedoms of the individual are inherent and not granted by the state.[41] This means that fundamental human rights and freedoms are not favours granted by benevolent governments but are entitlements of every human being by the fact of being human.[42] The Constitution also provides that the rights and freedoms enshrined in Chapter Four must be respected, upheld and promoted by all organs and agencies of government and by all persons.[43] In *Attorney General v. Joseph Tumushabe*,[44] where the main issue was whether the provisions regarding bail in Article 23 (b) of the Constitution apply to the proceedings in military courts in particular the General Court Martial, Justice Mulenga, delivering the unanimous decision of the Supreme Court stressed that "...the Constitution guarantees to every person the enjoyment of the rights set out in Chapter 4 except only in the circumstances that are expressly stipulated in the Constitution."[45] He pointed out that the Constitution also commands the government, its agencies and all persons, without exception, to uphold those rights. He held that the General Court Martial was not exempted from the constitutional command to comply with the provisions of Chapter Four. Military courts like their civilian counter parts are therefore obliged to respect and uphold the rights and freedoms contained in Chapter Four of the Constitution. This includes the right to a fair trial.

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[41] Article 20 (1).

[42] For an analytical discussion of fundamental human rights as inherent rights, see Morsink J (2000), *Inherent Human Rights: Philosophical Roots of the Universal Declaration*, University of Pennsylvania Press, Philadelphia.

[43] Article 20 (2).

[44] Supra note 36.

[45] Ibid, p.11.

The right to a fair trial which is stated as "the right to a fair hearing" is provided for in Article 28 of the Constitution. This Article provides that in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.[46] It is however provided that notwithstanding the above, nothing prevents the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, as may be necessary in a free and democratic society.[47] Article 28 (3) provides that every person who is charged with a criminal offence shall— be presumed to be innocent until proved guilty or until that person has pleaded guilty;[48] be informed immediately, in a language that the person understands, of the nature of the offence; be given adequate time and facilities for the preparation of his or her defence; be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice; in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State; be afforded, without payment by that person, the assistance of an interpreter if that person cannot understand the language used at the trial; and be afforded facilities to examine witnesses and to obtain the attendance of other witnesses before the court.

Trials in absentia are generally prohibited.[49] A person tried for any criminal offence, or any person authorised by him or her is entitled to a copy of the proceedings upon payment of a fee prescribed by law.[50] As a critical aspect of the right to a fair trial, it is also provided that no person should be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place

[46] Article 28 (1). In *Uganda Law Society & Another v. The Attorney General*, supra note 38, while emphasising that military courts are part of the judicial system of Uganda, the Constitutional Court held that the guarantees for judicial independence provided for in Article 128 of the Constitution also apply to military tribunals.

[47] Article 28 (2).

[48] Article 28 (4) however provides that nothing done under the authority of any law shall be held to be inconsistent with this clause, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts.

[49] Article 28 (5).

[50] Article 28 (6).

constitute a criminal offence.[51] As part of the right to a fair trial, the Constitution also provides that no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed.[52] Further, it is provided that a person who shows that he or she has been tried by a competent court for a criminal offence and convicted or acquitted of that offence shall not again be tried for the offence or for any other criminal offence of which he or she could have been convicted at the trial for that offence, except upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.[53] Related to this, the Constitution also provides that no person shall be tried for a criminal offence if that person shows that he or she has been pardoned in respect of that offence.[54] Finally, as part of the package of the right to a fair trial, the Constitution protects the right against self-incrimination[55] and also provides that except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.[56]

The right to a fair trial as summarised above is one of the four non-derogable fundamental rights and freedoms under the Constitution,[57] which means that it cannot be suspended, regardless of the circumstances. This demonstrates the importance that Uganda's Constitution and indeed the people of Uganda attach to the right to a fair trial. In fact, even those guarantees of the right to a fair trial protected in the ICCPR and the African Charter that are not explicitly provided for in Article 28 of the Constitution[58] are protected by virtue of Articles 45[59] and 287[60] of the Constitution. In

[51] Article 28 (7).

[52] Article 28 (8)

[53] Article 28 (9).

[54] Article 28 (10).

[55] Article 28 (11).

[56] Article 28 (12).

[57] See Article 44. The other non-derogable rights are: freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; and the right to habeas corpus.

[58] For instance the right to a competent tribunal protected by Article 14 (1) of the ICCPR.

[59] This Article provides that the rights and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in Chapter Four of the Constitution shall not be regarded as excluding others not specifically mentioned.

Uganda Law Society & Another v. The Attorney General,[61] delivering the unanimous decision of the Constitutional Court, Justice Twinomujuni pointed out that Article 28 of the Constitution which provides for the right to a "fair hearing" is not and was never intended to be exhaustive. Quoting Article 45 of the Constitution, he argued that it is clear that there are many other aspects of the right to a "fair hearing" that are not covered in Article 28 of the Constitution. These nonetheless remain protected. Thus, in response to the perception that there was no right of appeal from decisions of Field Court Martial, as this was not explicitly stated in the UPDF Act of 1992, Justice Twinomujuni observed that that was "...frequently asserted in our courts *as if we forget that the African Charter on Human and Peoples Rights... is part and parcel of our Constitution*."[62] He held that the African Charter was part of the Constitution by virtue of Article 287 of the Constitution.

The above notwithstanding, it is provided that in the enjoyment of the right to a fair trial and other rights and fundamental freedoms provided for in the Constitution, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.[63] Article 43 (2) of the Constitution provides that public interest shall not permit – political persecution; detention without trial; and any limitation on the enjoyment of the rights and freedoms prescribed by Chapter Four beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in the Constitution. In *Charles Onyango Obbo and Anor v. Attorney General*,[64] a case that was concerned with freedom of expression and speech as

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[60] Article 287 of the Constitution provides that "Where- (a) any treaty, agreement or convention with any country or international organisation was made or affirmed by Uganda or the Government on or after the ninth day of October, 1962, and was still in force immediately before the coming into force of this Constitution; or (b) Uganda or the Government was otherwise a party immediately before the coming into force of this Constitution to any such treaty, agreement or convention, the treaty, agreement or convention shall not be affected by the coming into force of this Constitution; and Uganda or the Government, as the case may be, shall continue to be a party to it."

[61] Supra note 38.

[62] Emphasis added.

[63] Article 43 (1).

[64] *Charles Onyango Obbo and Anor v. Attorney General*, Constitutional Appeal No.2 of 2002 [2004] UGSC 1 (11 February 2004) (Unpublished Judgement, on file). Available at www.ulii.org/cases/UGSC/ [Accessed on 1 April 2011].

guaranteed in Article 29 of Uganda's Constitution, the main issue was whether the Court of Appeal erred in failing to find that Section 50 of the Penal Code Act which criminalises the publication of false news was not demonstrably justifiable in a free and democratic society as required by Article 43 (2) c of the Constitution. In his leading judgement, Justice Mulenga stated that Article 43 (2) c is "a limitation upon the limitation."[65] He held that by virtue of Article 43 (2) c, any restrictions on the guaranteed rights in defence of public interest, however rationalised, cannot be valid unless they are acceptable and demonstrably justifiable in a free and democratic society.[66]

From the foregoing, it can safely be concluded that at least from a generic point of view, Uganda's Constitution sufficiently incorporates the guarantees of the right to a fair trial as understood in international human rights law. The guarantees of the right to a fair trial in the ICCPR and the African Charter are therefore part of Uganda's domestic law[67] and are binding on all persons and authorities in Uganda in accordance with Articles 2 (1) and 20 (2) of the Constitution. It is therefore appropriate that we now turn to analyse the extent to which Uganda's military justice system complies with the right to a fair trial. But before embarking on this task, it is essential to first briefly explore the structure of Uganda's current military justice system.

4.3 Overview of the Structure of Uganda's Military Justice System

The Constitution of the Republic of Uganda proclaims that "judicial power is derived from the people and shall be exercised by the courts established under this

[65] Ibid, p.12.

[66] Ibid.

[67] In most commonwealth countries (including Uganda) which follow the dualist approach to international law, treaties do not become part of domestic law merely by virtue of their ratification. They must be explicitly incorporated in domestic law through an Act of Parliament. Incorporation can be direct or indirect. Direct incorporation entails "wholesale" enactment, as part of domestic legislation, of an international agreement. Indirect incorporation also technically known as "reception" or "transformation" occurs when the provisions of an international agreement are reflected in parts of national legislation; or if pieces of national legislation are amended or repealed to conform with international norms, usually without explicit reference to the source of these norms. See Viljoen F (2007), *International Human Rights Law in Africa*, Oxford University Press, Oxford, pp.535-536. The ICCPR and the African Charter became part of Uganda's domestic law through indirect incorporation.

Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people."[68] Delivering the unanimous decision of the Supreme Court of Uganda in *Attorney General v. Joseph Tumushabe*,[69] Justice Mulenga emphasised that the principle stated in Article 126 (1) of the Constitution embraces all judicial power exercised by both the civilian and military courts. He rightly pointed out that "While Parliament established the Courts Martial as organs of UPDF, the authority to vest them with judicial power must be construed as derived from this constitutional principle, for only *'courts established under this constitution'* have mandate to exercise judicial power." He further pointed out that "...although Courts Martial are a specialised system to administer justice in accordance with military law, they are part of the system of courts that are, or are deemed to be, established under the Constitution to administer justice in the name of the people." [70]

Following on Article 126 (1), the Constitution further provides that the judicial power of Uganda shall be exercised by the courts of judicature which shall consist of: the Supreme Court of Uganda;[71] the Court of Appeal of Uganda;[72] the High Court of Uganda;[73] and *such subordinate courts as Parliament may by law establish,* including qadhis courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.[74] It is further provided that "the Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers of such a court."[75] Article 129 (3) provides that subject to the provisions of the Constitution, Parliament may make provision for the jurisdiction and procedure of the courts.

[68] See Article 126 (1).

[69] Supra note 36.

[70] Ibid, p.13.

[71] Article 129 (1) a.

[72] Article 129 (1) b.

[73] Article 129 (1) c.

[74] Article 129 (1) d. Emphasis added.

[75] Article 129 (2).

Under Article 210, Parliament is mandated to make laws regulating the UPDF[76] and in particular to provide for: the organs and structures of the UPDF;[77] recruitment, appointment, promotion, discipline and removal of members of the UPDF;[78] terms and conditions of service of members of the UPDF;[79] and the deployment of troops outside Uganda.[80] Pursuant to this provision, Parliament enacted the UPDF Act, 2005 as the major legal framework governing the UPDF.[81] The UPDF Act 2005 is "An Act to provide for the regulation of the Uganda Peoples' Defence Forces in accordance with article 210 of the Constitution, to repeal and replace the Armed Forces Pensions Act and the Uganda Peoples' Defence Force Act [1992], and for other related matters."[82] Part VIII of the Act, deals with the establishment and operation of military courts in Uganda. From the structural point of view, military courts in Uganda comprise of the Summary Trial Authority, Unit Disciplinary Committees and Courts Martial.[83] Under Courts Martial, the Act provides for a four tier military court system viz., Field Courts Martial; Division Courts Martial; the General Court Martial; and the Court Martial Appeal Court.[84]

4.3.1 The Summary Trial Authority

Under the "Summary Trial Authority," an accused person can be tried either by his or her commanding officer or officer commanding or by a superior authority.[85] A commanding officer or an officer commanding may try an accused person by

[76] The UPDF as the national army is established under Article 208 of the Constitution. which states inter alia that the UPDF shall be "non partisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established under the Constitution."

[77] Article 210 (a).

[78] Article 210 (b).

[79] Article 210 (c).

[80] Article 210 (d).

[81] Uganda Peoples' Defence Forces Act, Act No.7 of 2005.

[82] See the long title to the Act.

[83] See the definition of "military court" in Section 2.

[84] See the definition of "court martial" in Section 2.

[85] See Section 191. "Superior authority" is defined in Section 2 to mean the Chief of Defence Forces, Service Commanders, the Chief of Staff, or Service Chiefs of Staff.

summary trial[86] provided that the accused person is either a junior officer or a militant;[87] he or she has authority to try the offence under the UPDF Act or regulations made thereunder;[88] his or her powers of punishment are adequate having regard to the gravity of the offence;[89] and if he or she is not precluded from trying the accused person by reason of his or her election to be tried by court-martial.[90] In case of a conviction, the commanding officer or officer commanding can pass any of the following sentences i.e. detention for a period not exceeding six months;[91] forfeiture of seniority;[92] severe reprimand;[93] reprimand;[94] a fine not exceeding basic pay for one month;[95] and minor punishments as may be prescribed.[96] Each of these punishments is deemed to be a punishment less than any other punishment preceding it.[97] Officers senior in command to the commanding officers or officers commanding are barred from interfering with the powers of the commanding officers or officers commanding except in exercise of their appellate powers.[98]

With regard to trials by superior authority, it is provided that a superior authority may try a senior army officer by summary trial if – he or she is equal to or higher in rank than the accused;[99] the offence is one that he or she is authorised to try;[100] his or her

[86] Section 191 (1). According to Section 2, "summary trial" means an informal trial of a minor offence conducted by a summary trial authority by which the accused has duly opted to be tried.

[87] Section 191 (2) a.

[88] Section 191 (2) b. The offences triable by a Summary Trial Authority are provided for in the Eighth Schedule to the UPDF Act. They include: disobeying lawful orders, insubordinate behaviour, violence to a superior officer, drunkenness, quarrels and disturbances, scandalous conduct by officers and absence without leave. A notable feature about many of these offences is that on the face of it, they appear to be disciplinary in nature as opposed to criminal offences.

[89] Section 191 (2) c.

[90] Section 191 (2) d.

[91] Section 191 (3) a.

[92] Section 191 (3) b.

[93] Section 191 (3) c.

[94] Section 191 (3) d.

[95] Section 191 (3) e.

[96] Section 191 (3) f.

[97] Section 191 (4).

[98] Section 191 (5).

[99] Section 192 (2) a.

powers of punishment are adequate having regard to the gravity of the offence;[101] and if he or she is not precluded from trying the accused person by reason of his or her election to be tried by court martial.[102] On conviction, the superior authority can pass one or more of the following punishments: forfeiture of seniority;[103] severe reprimand;[104] reprimand;[105] and fine.[106]

There are a number of reasons why many military justice systems around the world like that of Uganda give commanding and senior military officers the power to hear cases by way of summary trial. Most of these reasons relate to the need to enforce discipline in the armed forces. It is argued by scholars like Rowe that since commanding officers have the responsibility for the maintenance of discipline in their units, the power to try soldiers under their control provides them with a means to directly enforce this discipline on their subordinates.[107] Also, the power to hear cases summarily is considered important for ensuring speedy trials. As Gibson generally argues, extensive delays in dealing with offences which have disciplinary implications can result in rapid erosion of discipline and consequential negative effects on operational effectiveness of an armed force.[108]

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[100] Section 192 (2) b. The offences triable by a superior authority are the same as those triable by commanding officers. They are provided for in the Eighth Schedule to the UPDF Act.

[101] Section 192 (2) c.

[102] Section 192 (2) d. If the accused elects to be tried by court-martial, the superior authority may either convene the court martial or may refer the charge to a higher authority. See Regulation 20 of the UPDF (Rules of Procedure) Regulations, Statutory Instrument 307 – 1.

[103] Section 192 (3) a.

[104] Section 192 (3) b.

[105] Section 192 (3) c.

[106] Section 192 (3) d.

[107] See Rowe (2006), *The Impact of Human Rights Law on Armed Forces, Cambridge University Press*, Cambridge, p.73.

[108] See Gibson (2008), "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility While Precluding Impunity," *Journal of International Law and International Relations*, Vol.4, No.1, p.16.

As regards the trial itself, it is a requirement that an accused officer or militant should be afforded a proper opportunity to prepare himself or herself for the trial[109] and should be informed of – the charges brought against him or her;[110] the fact that he or she is to be subjected to summary trial;[111] and his or her right to elect to be tried by court martial.[112] Where the accused person opts for summary trial, they are not entitled to representation by counsel.[113] It is explicitly provided that "there shall be no legal officer at such trial" but that both the accused and the summary trial authority can seek legal advice out of court.[114] There is no prosecution side at a summary trial.[115] The accused person is arraigned by the summary trial authority who examines both the witnesses for the state and the witnesses for the defence.[116] Needless to point out, it is the summary trial authority which in the first place prefers and investigates the charges against the accused officer or militant. It is observable that this arrangement and way of administering military justice is akin to the deplorable position during the colonial era where, as was analysed in Chapter Three, the commanding officers had power to place charges and try accused officers without any legal representation.

Appeals from decisions of summary trial authority lie only to the commanding officer or the immediate superior in command of the summary trial authority.[117] In particular, appeals from decisions of superior authority in exercise of original jurisdiction lie to the Commander-in-Chief.[118] It is a requirement that all appeals should be submitted through the summary trial authority that presided at the trial at which the decision

[109] Section 205 (1).

[110] Section 205 (1) a.

[111] Section 205 (1) b.

[112] Section 205 (1) c.

[113] Ibid.

[114] Section 205 (2).

[115] Section 205 (4).

[116] Section 205 (5).

[117] Section 207 (1).

[118] Ibid. The question is: Can this arrangement amount to an appeal within the meaning of the right to appeal as understood in international human rights law? The answer is explored in Section 4.4.4 of this thesis.

appealed against was made.[119] The summary trial authority must endorse the appeal to his or commanding officer or immediate superior in command.[120] On receipt of the appeal, the commanding officer or immediate superior in command of the summary trial authority must refer the appeal to an advocate for advice and he or she or the Commander-in-Chief, as the case may be may, if necessary, take corrective action or order a retrial.[121] The UPDF Act and the Regulations are silent as to the advocate from whom the advice is sought[122] and whether or not his or her advice is binding. It is plausible to argue however that such advice is not binding; otherwise the law would have explicitly stated so.

From the above exploration, one may be tempted to assume that as the trials by Summary Trial Authority are generally disciplinary in nature (especially going by the nature of the offences they are authorised to try),[123] the right to a fair trial does not apply to them. But as was established in Chapter Two of this thesis, the right to a fair trial applies to all proceedings involving determination of criminal charges. The pertinent question therefore is: Do trials by summary trial authority involve determination of criminal charges? As was stressed in Chapter Two, the HRC has emphasised that the notion of a "criminal charge" does not only relate to acts declared punishable under domestic criminal law, but also extends to acts that are criminal in nature and whose sanctions are penal because of their purpose, character or severity.[124] Therefore, regardless of the domestic law classification of the offence with which someone is charged, if the penalty to be incurred involves deprivation of liberty and where the duration and manner of its execution is appreciably detrimental, then any such proceedings would amount to "determination of a criminal charge," in which case the right to a fair trial applies.[125] Specifically, as the ECrtHR rightly emphasised, "...in a society subscribing to the rule of law, there belong to the

[119] Section 207 (2).

[120] Section 207 (3).

[121] Section 208.

[122] Section 2 defines "advocate" to mean an advocate admitted and enrolled under the Advocates Act Cap. 267, Laws of Uganda, 2000.

[123] See supra notes 88 and 100.

[124] HRC General Comment 32 (2007), para.15.

[125] *Engel v. Netherlands,* (1976) 1 EHHR 647, para.82.

'criminal' sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration, or manner of execution cannot be appreciably detrimental."[126]

Summary trial authorities as highlighted above, have power to sentence a convict to six months detention among other punishments. It is submitted that this is a serious punishment involving deprivation of liberty for too long a duration that it can rightly be argued that the sentence belongs to the "criminal" sphere, thereby making the right to a fair trial applicable to trials by summary trial authorities. In *Engel v. Netherlands*, regarding charges whose maximum penalty was four months committal to a disciplinary unit, the ECrtHR held that such charges came within the criminal sphere since their aim was the imposition of serious punishments involving deprivation of liberty.[127] Clearly therefore, Summary Trial Authorities are obliged to respect and uphold the right to a fair trial in their administration of military justice.

4.3.2 Unit Disciplinary Committees

Section 195 (1) of the UPDF Act establishes a Unit Disciplinary Committee for each Unit of the defence forces.[128] Unit Disciplinary Committees consist of: a chairperson who should not be below the rank of captain;[129] the administration officer of the unit;[130] the political commissar of the unit;[131] the Regiment Sergeant Major or Company Sergeant Major of the unit;[132] two junior officers;[133] and one private.[134] The UPDF Act and the Regulations made thereunder are silent on the question of the appointing authority of the members of Unit Disciplinary Committees who are members not by virtue of the positions they hold in the Unit i.e. the chairperson, the two junior officers and the private. This silence on a very important issue can be

[126] Ibid.

[127] Ibid, para.85.

[128] According to Section 2, "Unit" means a unit of battalion strength or any other unit as declared by the Defence Forces Council.

[129] Section 195 (1) a.

[130] Section 195 (1) b.

[131] Section 195 (1) c.

[132] Section 195 (1) d.

[133] Section 195 (1) e.

[134] Section 195 (1) f.

problematic in terms of the independence and impartiality of such members. The quorum of a Unit Disciplinary Committee is five members including the chairperson.[135] The jurisdiction of a Unit Disciplinary Committee is limited to trying persons accused of committing non-capital offences under the UPDF Act.[136] It can impose any sentence authorised by law.[137] The convening authority of a Unit Disciplinary Committee is a Division Commander or a Commander of the equivalent formation.[138] In addition, the High Command[139] or any other authority as may be authorized can convene a Unit Disciplinary Committee.[140] This is so because Section 196 (1) of the UPDF Act states that "The High Command or any other authority as may be authorized in that behalf by the High Command may convene a military court." Section 2 of the UPDF Act defines a "military court" to include not only a court martial but also a unit disciplinary committee and a summary trial authority. Decisions of a Unit Disciplinary Committee are by majority opinion and once passed, are binding on all the members concerned.[141] It is an offence for any member who takes part in the proceedings of the Committee to disassociate him or herself from the decision.[142] A party to the proceedings of a Unit Disciplinary Committee or court martial other than a Field Court Martial who is not satisfied with its decision has the right to appeal to an appellate court on any or all of the following matters – the

[135] Section 195 (2).

[136] Section 195 (3). The UPDF Act does not define what a capital or non-capital offence is.

[137] Section 195 (4).

[138] Section 196 (2).

[139] The High Command is mainly comprised of the top military hierarchy of the UPDF. According to Section 15 (1) of the UPDF Act, it is comprised of the President as the chairperson; the Minister responsible for defence; members of the High Command on 26 January 1986 whose names are set out in the Third schedule to the UPDF Act; the Chief of Defence Forces; all Service commanders; the Chief of Staff; all Service Chiefs of Staff; all Chiefs of the Services of the Defence Forces; all commanders of any formations higher than a Division; all Division Commanders, officers commanding equivalent units of the Defence Forces and the Commandant of the General Headquarters; and such other commanders and experts as are from time to time co-opted by the President to advise the High Command. A notable and very disturbing aspect about this composition is that the law entrenches certain individuals (i.e. members of the High Command on 26 January 1986) as members of the High Command for life. This is an unacceptable practice in a democratic society.

[140] Section 196 (1).

[141] Section 201 (1).

[142] Section 201 (2).

legality or propriety of any or all the findings; the legality of the whole or part of the sentence; and the severity or leniency of the sentence.[143]

The important question to be asked now is: Given their jurisdiction among other things, does the right to a fair trial apply to proceedings before Unit Disciplinary Committees? It is observable to note in this respect that the name "Unit Disciplinary Committee" is misleading as to the real nature of proceedings which the Unit Disciplinary Committees actually deal with. The name presupposes that they only deal with disciplinary matters as opposed to criminal charges, so that the right to a fair trial is inapplicable to them. A critical analysis of the law governing their operations however reveals that, in fact, Unit Disciplinary Committees are also heavily involved in the determination of criminal matters/charges, and are therefore obliged to respect and uphold the right to a fair trial. As pointed out above, the jurisdiction of Unit Disciplinary Committees is limited to trying persons accused of committing non-capital offences. Although the UPDF Act and its regulations do not define what a "capital" or "non-capital" offence is, the term "misdemeanour" which can generally be accepted as its equivalent, is defined in the Penal Code Act as an offence which is not a felony.[144] A felony is defined as an offence which is declared by law to be so or, if not declared to be a misdemeanour, is punishable with death or with imprisonment for three years or more.[145] This therefore means that a Unit Disciplinary Committee has power to try offences where the accused person risks incurring serious punishments including imprisonment for upto three years. Indeed Article 195 (4) of the UPDF Act explicitly states that a Unit Disciplinary Committee has power to pass any sentence authorised by law. According to Section 221 of the UPDF Act which provides the scale of the different punishments that may be imposed in respect of service offences, imprisonment for two or more years is second to death in terms of severity. It is higher in scale than all the other punishments authorised by law. Deprivation of one's liberty for three years is without a doubt a serious punishment and too long that it can correctly be argued that the sentence belongs to the "criminal"

[143] Section 227 (1).

[144] See Section 2 of the Penal Code Act, Cap 120, Laws of Uganda.

[145] Ibid.

sphere, thereby making the right to a fair trial applicable to proceedings before the Unit Disciplinary Committees.

4.3.3 Division Courts Martial

The UPDF Act establishes a Division Court Martial for each Division or equivalent formation of the defence forces.[146] A Division Court Martial has unlimited original jurisdiction under the UPDF Act.[147] It consists of: a chairperson who should not be below the rank of Major;[148] two senior officers;[149] two junior officers;[150] a political commissar;[151] and one non-commissioned officer.[152] All the above officers are appointed by the High Command for a period of one year[153] and are eligible for re-appointment.[154] The quorum of a Division Court Martial is five members, but when trying an accused person for a capital offence, all members of court must be present.[155] The power to convene a Division Court Martial vests in the High Command or any other authority authorised in that behalf by the High Command.[156] Decisions of a Division Court Martial like those of a Unit Disciplinary Committee are by majority opinion and once passed, are binding on all the members concerned.[157] It is an offence for any member who takes part in the proceedings of a court martial or Unit Disciplinary Committee to disassociate him or herself from the decision.[158]

This aspect of Uganda's military justice system is problematic and quite disturbing. Why should a member of court be bound by a decision he or she doesn't believe in, to the extent of making it an offence if he or she disassociates him or herself from that decision? If even at Supreme Court level, where it is highly desirable that all judges

[146] Section 194.

[147] Ibid.

[148] Section 194 (a).

[149] Section 194 (b).

[150] Section 194 (c).

[151] Section 194 (d).

[152] Section 194 (e).

[153] Section 194.

[154] Section 198 (a).

[155] Section 198 (c).

[156] Section 196 (1).

[157] Section 201 (1).

[158] Section 201 (2).

should be in agreement with the decision of Court, their Lordships are allowed to give dissenting judgments, what makes military courts special? It is in fact arguable, that this aspect of making it an offence for a member of military court to disassociate him or herself from the majority opinion of court, is one of the issues that puts the independence and impartiality Uganda's military tribunals into question. As was discussed in Section 2.3.3 for instance, the right to an impartial tribunal requires that tribunals must not only be subjectively free from personal bias, but should also appear to reasonable observers to be impartial. Given the many shortcomings of Uganda's military justice system as far as the right to a fair trial is concerned, as this Chapter will establish, it is submitted that when military law also makes it an offence for a member of military court to disassociate him or herself from a decision of court he or she does not believe in, a reasonable observer would indeed doubt the independence and impartiality of Uganda's military tribunals.

With respect to the question whether or not the right to a fair trial applies to the proceedings before the Division Courts Martial, it is important to note that as earlier pointed out, these courts have unlimited original jurisdiction under the UPDF Act.[159] This means that they have jurisdiction to hear and determine all offences (*including criminal offences or offences that are criminal in nature*)[160] provided for under the UPDF Act. By virtue of their jurisdiction, the Division Courts Martial therefore also have power to pass any sentence as provided for in the UPDF Act including death and imprisonment for two or more years.[161] Clearly therefore, the right to a fair trial applies to the Division Courts-Martial as well.

4.3.4 Field Courts Martial

Uganda's military justice system also consists of Field Courts Martial.[162] Field Courts Martial consist of the Field Commander of the operation as the chairperson and eight other members appointed in writing by the deploying authority before departure.[163] Like the Division Courts Martial and the Unit Disciplinary Committees, decisions of

[159] See supra note 147.

[160] Emphasis added.

[161] Section 221.

[162] See Section 200.

[163] Section 200 (1).

the Field Courts Martial are by majority opinion, and when a decision is reached in such manner, it is binding on all members.[164] Prosecutors; witnesses for the prosecution; provost officers; and persons who prior to the proceedings of the court martial participate in the investigation of the case against the person charged are disqualified from sitting as members of Field Courts Martial.[165]

The jurisdiction of Field Courts Martial is limited to only circumstances where it is impractical for the offender to be tried by a Unit Disciplinary Committee or a Division Court Martial.[166] In *Uganda Law Society & Another v. The Attorney General*,[167] one of the contentious issues that the Constitutional Court had to determine was whether at the time of the Kotido Field Court Martial in question, circumstances existed such that it was not practical for the alleged offenders to be tried by a Unit Disciplinary Committee or a Division Court Martial. In addressing this issue, Justice Twinomujuni who delivered the unanimous decision of Court posed a very important question regarding the jurisdiction of Field Court Martial in the above respect. He asked: "Who is competent to determine whether the requisite circumstances existed; is it subjectively the province of the appointing authority or can the matter be determined using an objective test by another person or authority like a court of law?" Noting that on the particular day in question, there was no evidence of a war like situation or military operation in progress, he nonetheless stated that it was not possible for a person or authority like court to determine the nature of the military operation that was required in Karamoja to disarm the heavily armed war lords of Karamoja region. He opined that such decision should be left to the military command and the appointing authority to use his good judgement in accordance with the intelligence he may be in possession of. He therefore held that since that is what happened in the case in question, the Field Court Martial which handled the Kotido trial was a competent court.

With great respect, it is submitted that the Court applied the wrong test. The correct test should be an objective one. This can reasonably be implied from the very language of Section 200 (2) of the UPDF Act which states that "A Field Court Martial

[164] Section 201 (1).

[165] Section 203.

[166] Section 200 (2).

[167] Supra note 38.

shall only operate *in circumstances* where it is impractical for the offender to be tried by a Unit Disciplinary Committee or Division Court Martial."[168] Going by the language used in the above provision, it could not have been the intention of the Legislature that the issue of whether or not circumstances exist to warrant a Field Court Martial should be left to the entire discretion of the military commanders or the Commander-in-Chief. Were this to be the case, the law would have explicitly stated so. It would have stated that A Field Court Martial shall only operate in circumstances where the Field Commander or the deploying authority considers it impractical for the offender to be tried by a Unit Disciplinary Committee or Division Court Martial. In the above case therefore, both the parties to the proceedings should have adduced evidence as to the circumstances that existed at the time in question and from such evidence, the Court should then have ruled whether from an objective point of view, it was impractical to have the offenders tried by a Unit Disciplinary Committee or a Division Court Martial.

Regarding the important question whether or not the right to a fair trial applies to Field Courts Martial, these courts like the Division Courts-Martial have unlimited jurisdiction under the UPDF Act. Like the Division Courts Martial, they therefore also have jurisdiction to hear and determine all offences provided for under the UPDF Act including criminal offences or offences that are criminal in nature. They can also pass any sentence under the UPDF Act including penal sentences like death and imprisonment for two or more years. From this perspective therefore, the right to a fair trial also applies to the Field Courts-Martial.

4.3.5 The General Court Martial

Uganda's military justice structure also includes the General Court Martial for the Defence Forces.[169] The General Court Martial is the second highest military court in the country. It comprises of a chairperson who should not be below the rank of Lieutenant Colonel;[170] two senior officers;[171] two junior officers;[172] a political

[168] Emphasis added.

[169] Section 197 (1).

[170] Section 197 (1) a.

[171] Section 197 (1) b.

[172] Section 197 (1) c.

commissar;[173] and one non-commissioned officer.[174] All members of the General Court Martial are appointed by the High Command for a period of one year.[175] They are all eligible for re-appointment.[176] The General Court Martial has both original and appellate jurisdiction.[177] Its appellate jurisdiction includes hearing and determining all appeals referred to it from decisions of Division Courts Martial and Unit Disciplinary Committees.[178]

The General Court Martial also has revisionary powers in respect of findings, sentences or orders made or imposed by any Summary Trial Authority or Unit Disciplinary Committee.[179] The quorum of the General Court Martial is five members,[180] but when trying an accused person for a capital offence, all members of the court must be present.[181] Decisions of the General Court like other courts martial are by majority opinion,[182] and when the decision is reached in that manner, it is binding on all members of the court.[183] As the General Court Martial also has unlimited original jurisdiction under the UPDF Act,[184] for the reasons advanced in respect of the Division Courts Martial and the Field Courts Martial, the right to a fair trial also applies to it.

4.3.6 The Court Martial Appeal Court

The Court Martial Appeal Court is the highest military court in Uganda. It hears and determines all appeals referred to it from decisions of the General Court Martial.[185]

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[173] Section 197 (1) d.

[174] Section 197 (1) e.

[175] Section 197 (1).

[176] Section 198 (a).

[177] Section 197 (2). Like the Division Courts Martial, the original jurisdiction of the General Court Martial under the UPDF Act is unlimited.

[178] Ibid.

[179] Section 197 (3).

[180] Section 198 (c).

[181] Ibid.

[182] Section 201 (1).

[183] Ibid.

[184] Supra note 177.

[185] Section 199 (1).

The Court Martial Appeal Court comprises: a chairperson who must be an advocate qualified for appointment as a judge of the High Court of Uganda;[186] two senior officers of the defence forces;[187] and two advocates who must be members of the defence forces.[188] All members of the Court Martial Appeal Court are appointed by the Commander-in-Chief of the UPDF on the advice of the High Command.[189] The registrar of the Court Martial Appeal Court, who must be a legally qualified person, is appointed by the High Command.[190] The quorum of the Court Martial Appeal Court is three members, but when considering an appeal against a judgement involving a sentence of death, the quorum must be five members.[191] Decisions of the court, as is the case with other military tribunals, are by majority opinion.[192] The Court Martial Appeal Court is the last appellate military tribunal in Uganda. No appeal lies from the Court Martial Appeal Court to any other court, except cases of appeal against convictions involving death sentence or life imprisonment which have been upheld by it.[193] In such cases, the appellant has a right of further appeal to the Court of

[186] Section 199 (2) a. According to Article 143 of the Constitution, a person is qualified for appointment as a judge of High Court, if he or she has been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practiced as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters.

[187] Section 199 (2) b.

[188] Section 199 (2) c.

[189] Regulation 3 (1) of the UPDF (Court-Martial Appeal Court) Regulations, Statutory Instrument 307 – 7. It is worth observing that many critical aspects of the Court Martial Appeal Court including the appointing authority of its members are not stipulated in the principal legislation i.e. the UPDF Act 2005, but are instead provided for in the regulations. One of the major implications of this arrangement is that many important aspects of the Court Martial Appeal Court can be changed at any time by the minister responsible for defence without Parliamentary oversight or approval. Under Section 252 of the UPDF Act, the Minister responsible for Defence after consultation with the Defence Forces Council, has power to make, unmake or change regulations as may be necessary or convenient for ensuring the discipline and good administration of the Defence Forces and generally for the better carrying out of the provisions of the UPDF Act.

[190] Section 199 (3) of the UPDF Act.

[191] Ibid, Section 199 (4).

[192] Regulation 4 (2) of the UPDF (Court-Martial Appeal Court) Regulations, supra note 173.

[193] Ibid, Regulation 20 (1).

Appeal.[194] It is obvious that like with all the other military courts earlier discussed, the right to a fair trial certainly also applies to the Court Martial Appeal Court.

4.3.7 Other Key Players in the Administration of Military Justice

Other than the members of military courts, persons who act as judge advocates and the prosecutors are the other key players in the administration of military justice in Uganda. An overview of the structure of Uganda's military justice system would therefore be incomplete without highlighting their role and the law governing their operations. The UPDF Act provides that at any proceedings of a Court Martial or Unit Disciplinary Committee, there must be a secretary to record all the proceedings of the court;[195] an advocate or, in case of a Unit Disciplinary Committee, a para-legal to advise the court during its proceedings on the law and procedure;[196] and a prosecutor.[197] All these officers are appointed by the High Command or any other authority as may be authorised in that behalf by the High Command.[198]

Specifically regarding the role of the judge advocate, on the assembly of the court, he or she is charged with responsibility of advising the court of any defect in its constitution or in the charge sheet.[199] During the trial, the judge advocate is charged with the responsibility of advising the court upon all questions of law or procedure which may arise.[200] His advice on such matters is binding unless the court has good grounds for not following it.[201] After the closing addresses, the judge advocate is charged with the responsibility of summing up the evidence and advising the court upon the law relating to the case.[202] He does not participate in the deliberations on the findings of the court nor does he take part in the sentencing.[203] It is however provided that if the judge advocate is of the opinion that the finding of court is contrary to the

[194] Ibid, Regulation 20 (2).

[195] Section 202 (a).

[196] Section 202 (b).

[197] Section 202 (c).

[198] Section 202.

[199] Regulation 78 of the UPDF (Rules of Procedure) Regulations, Statutory Instrument 307 – 1.

[200] Ibid.

[201] Ibid.

[202] Ibid.

[203] Ibid.

law relating to the case, "he shall, on one more occasion only, advise the court what findings are, in his opinion, open to them, and the court shall then reconsider its findings in closed court."[204] The prosecutor and the accused person are, at all times entitled to the opinion of the judge advocate on any question of law or procedure relative to the charge or trial, whether he is in court or out of court.[205]

To what extent does the structure of Uganda's military justice system analysed above comply with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal? This is the major question that we now proceed to address in Section 4.4 below.

4.4 Compliance of Uganda's Military Justice with the Right to a Fair Trial

It is the major argument of this thesis that despite attempts at reform, Uganda's current military justice is in many ways still stuck in its colonial origins and falls far too short of complying with the right to a fair trial as understood in international human rights law. The analysis in this section, is, for the most part, based on a critical examination of Uganda's military justice legal framework. We begin by first analysing the compliance of Uganda's military justice legal framework with the right to a competent tribunal; followed by the right to an independent tribunal; the right to an impartial tribunal; the right to a public hearing; and finally the right to a fair hearing.

4.4.1 Compliance with the Right to a Competent Tribunal

In Chapter Two, it was established that the right to a competent tribunal as provided for in international human rights law has two major aspects i.e. the competence of the persons who constitute a tribunal and the jurisdiction of the tribunal. The former requires that persons called upon to play judicial roles in military tribunals must have appropriate legal training and qualifications comparable to those required of professional judges and must be people of integrity. It is only then that they can competently and properly administer justice according to established legal rules and procedures. The latter requires that military tribunals must have jurisdiction over both

[204] Ibid.

[205] Ibid.

the subject matter (jurisdiction *ratione materiae*) and the persons they try (jurisdiction *ratione personae*). As was discussed in Chapter Two, international human rights law emphasises that the jurisdiction of military tribunals must be restricted to offences of a strictly military nature committed by military personnel and that, the trial of civilians by military tribunals should be exceptional i.e., limited to cases where the state can show that the trial of civilians by military tribunals is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue, the regular civilian courts are unable to undertake the trials.[206] Specifically, in *Madani v. Algeria*, the HRC set the test thus "…the State party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. The state must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14 [of the ICCPR]."[207]

It is against the above criteria that we assess the competence of Uganda's military tribunals. From these criteria, the following questions can be posed as a guide to the ensuing analysis: To what extent does Uganda's military justice legal framework guarantee the legal competence of the country's military tribunals? To what extent does Uganda's military justice legal framework ensure that the jurisdiction of military tribunals is limited to only offences of a military nature committed by military personnel? In case of military tribunals having jurisdiction over civilians, are there serious justifications for such deviation from the international human rights position? In particular, are the regular civilian courts in Uganda unable to undertake those trials in which military tribunals are given jurisdiction over civilians? Are other alternative forms of special or high-security civilian courts inadequate to the task? Is resort to military tribunals unavoidable? In case it is unavoidable, are the military tribunals in position to ensure the full protection of the rights of the accused persons guaranteed by Article 14 of the ICCPR?

[206] HRC General Comment 32 (2007), para.22.

[207] *Madani v. Algeria* , U.N. Doc. CCPR/C/89/D/1172/2003 (2007), para.8.7.

With regard to the first question, as was pointed out in Chapter Two, in the context of military justice, it is normally the judge advocates that ensure legal competence of military tribunals. But where there are no judge advocates or, where they do not possess appropriate legal qualifications or, the weakness of the military justice system generally make it difficult for their legal competencies to bear on the proceedings and decisions of court, it becomes important to examine whether (especially with respect to the members of the court) there are measures that can be taken to guarantee the legal competence of the courts. In attempt to ensure that Uganda's military courts are legally competent, Section 202 (b) of the UPDF Act 2005 provides that at any proceeding of court martial, there must be an advocate or, in case of a Unit Disciplinary Committee, a para-legal to advise the court during its proceedings on issues of law and procedure. During the parliamentary debates preceding the enactment of the UPDF Act 2005 and its predecessor – the UPDF Act 1992, some Members of Parliament argued that such a provision would suffice to make Uganda's military courts legally competent.[208]

It is submitted that in Uganda's circumstances, the mere presence of an advocate at courts martial to advise the courts on issues of law and procedure is not sufficient to fulfill the requirement of ensuring that military tribunals are legally competent. First of all, the advocates are not members of court and do not participate in the deliberations on the findings of the court nor take part in the sentencing. Secondly, not all military tribunals have advocates to advise them on issues of law and procedure. There is, for instance, no provision for advocates to advise a summary trial authority on issues of law and procedure. In fact, the UPDF Act expressly provides that "there shall be no legal officer at a summary trial."[209] This is notwithstanding the fact that a summary trial authority is classified as a military court and as earlier discussed, by virtue of its penal sentencing powers, is bound by the right to a fair trial.

In the case of the Unit Disciplinary Committees, it is para-legals and not advocates who advise the Committees on issues of law and procedure. It is submitted that given

[208] See for instance the argument by Major General Elly Tumwine in Parliament of Uganda (1991-1992), Parliamentary Debates (HANSARD) Official Report, Fifth Session, Issue No.21, p.175.

[209] See Section 205 (2).

their level of training, para-legals are not qualified enough to competently advise these tribunals on the technicalities of law and procedure that may arise during their conduct of judicial business.[210] Although the jurisdiction of the Unit Disciplinary Committees is limited to trial of non-capital offences, some of those offences and the penalties involved are too complex for para-legals to competently handle. But even for those military tribunals like the General Court Martial and the Division Courts Martial where there are qualified advocates to advise the court on issues of law and procedure, the value of their advice is compromised by the fact that, as shall be analysed later, they cannot be said to independent and impartial as is required in international human rights law. In any case, there is some evidence that in practice, persons appointed as judge advocates are never given sufficient opportunity to address the court on issues of law and procedure and very often, their advice is ignored by the members of military courts.[211] Besides, depending on the particular case, matters of law and procedure are not simple issues that it should be expected that members of military tribunals will easily and quickly comprehend them especially given the speed at which military courts dispose of cases. It therefore follows that mere provision for advocates or para-legals to advise military courts on issues of law and procedure does not sufficiently ensure that Uganda's military tribunals are legally competent as is required by the right to a competent tribunal.

Unfortunately, the members of military courts who would have filled the legal competence deficiency of the military tribunals are generally not required to be legally competent. Other than the Court Martial Appeal Court where it is required that the chairperson should be an advocate qualified for appointment as a judge of the High Court of Uganda,[212] and that the court should be composed of two other

[210] The academic requirement for para-legals is merely a diploma in law. They are not required to have a degree in law nor the postgraduate diploma in legal practice – qualifications which, it is submitted, are critical for any one to adequately appreciate the intricacies of law and procedure.

[211] See Professor George Kanyeihamba's submission in Parliament of Uganda (1991-1992) Parliamentary Debates (HANSARD) Official Report, supra note 207.

[212] See Section 199 (2) a of the UPDF Act. According to Article 143 (1) e of the Constitution, a person is qualified for appointment as a judge of High Court, "...if he or she is or has been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practiced as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters." For one to be enrolled as an advocate in Uganda,

advocates among other members, there is no legal requirement that members of military tribunals in Uganda should have appropriate legal training. Also, in practice, legally qualified persons are rarely appointed as members of military tribunals. On his part, when defending the UPDF Bill (as the responsible minister) during the Parliamentary debates leading to the enactment of the UPDF Act 2005, Hon. Amama Mbabazi – the Minister of Defence at the time, vehemently argued against having legally qualified persons as members of military tribunals. He shockingly argued that except at the Court Martial Appeal Court, issues of law rarely arise in the proceedings before the other military tribunals;[213] "... in most of the levels of trial courts, it is a question of establishing facts whether people did it or did not do it, and we do not really need professional lawyers to do that," he argued.[214] With respect, the Minister's argument was very disappointing. As long as military tribunals apply the law to the facts in the adjudication of cases – which they are obliged to do, then obviously issues of law arise regardless of the level of court. Indeed it could be that there are many issues of law that arise in the administration of military justice only that, perhaps, as is evident in Professor Kanyeihamba's revelation,[215] they are not taken serious by the military tribunals. In fact, going by Hon. Amma Mbabazi's argument, it would seem that "facts" are more important than the law insofar as the administration of military justice in Uganda is concerned.

Hon. Amma Mbabazi also argued that requiring lawyers to man military tribunals could stifle the administration of military justice because there could arise occasions when there would be no lawyers in the army to administer justice.[216] To the extent that Uganda would allow such a situation to happen, means that it would have abdicated its international human rights obligation of ensuring that its military courts

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they must have a Bachelors Degree in Law (LLB) from a recognized institution and a Postgraduate Diploma in Legal Practice. See Sections 8 and 11 of the Advocates Act, Cap 267, Laws of Uganda, 2000 and Regulation 2 of the Advocates (Enrollment and Certification) Regulations, Statutory Instrument No. 267 – 1.

[213] See Parliament of Uganda (2005), Parliamentary Debates (HANSARD) Official Report, 4th Session – Third Meeting, Issue No.30, p.12533.

[214] Ibid.

[215] Supra note 211.

[216] Supra note 213.

are competent. In any case, as Captain Guma[217] and Hon. Twarabireho[218] pointed out during the parliamentary debates, there are many lawyers in the UPDF and there are still many members of the UPDF who are studying law at various institutions of higher learning. It is just that for unclear reasons, Government does not seem to be comfortable with having legally trained persons as members of military tribunals.[219] This leaves a lot to be desired. How do persons who are legally incompetent administer fair justice according to law as should be the case in any democratic society? This unwillingness and or failure to ensure that Uganda's military tribunals are sufficiently legally competent is reminiscent of Uganda's early military justice systems during the colonial times, which, as was pointed out in Chapter Three, did not require military courts to be legally competent nor provide guarantees for ensuring their legal competence. That this is almost still the position in 21st century Uganda, when the country is clearly bound by various international human rights instruments to ensure that its courts including military tribunals are legally competent, is very regrettable. It proves the hypothesis that despite attempts at reform, Uganda's military justice is to a large extent, still stuck in its historical origins.

As regards the extent to which Uganda's military justice legal framework ensures that the jurisdiction of military tribunals is limited to only offences of a military nature, both the HRC and the ACHPR have consistently emphasised that the jurisdiction of military tribunals should be limited to offences of a military nature.[220] Principle 8 of the UN Principles on Military Justice[221] also stresses, inter alia, that "The jurisdiction of military courts should be limited *to offences of a strictly military nature* committed

[217] See Parliament of Uganda (2004), Parliamentary Debates (HANSARD) Official Report, 4th Session – First Meeting, Issue No.27, p.11140.

[218] Ibid, p.11143.

[219] It is observable in this respect that even the proposal by Hon. Ruhindi to the effect that as a compromise, the law should at least specify that the chairpersons of military tribunals should "preferably" be advocates was not supported. See supra note 213, p.12535.

[220] See for instance UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Cameroon*, 4 November 1999. CCPR/C/79/Add.116, para. 21 and *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, African Commission on Human and Peoples' Rights Comm. No. 224/98 (2000), para.62.

[221] The UN Draft Principles Governing the Administration of Justice through Military Tribunals, U.N.Doc.E/CN.4/2006/58 at 4 (2006).

by military personnel."[222] A critical examination of Uganda's military justice legal framework however reveals that military tribunals in Uganda have wide discretion to try nonmilitary offences not only under the UPDF Act but also under any other law in Uganda. The law provides that any person subject to military law, who does or omits to do an act in Uganda or outside Uganda, which constitutes (or if it had taken place in Uganda) would constitute an offence under the Penal Code Act or any other enactment, commits a service offence and is therefore liable to trial by a military court.[223] A "service offence" is defined as an offence under the UPDF Act or any other Act in force, committed by a person while subject to military law.[224] This means therefore that Uganda's military tribunals have jurisdiction to try persons subject to military law not only for commission of military offences but also ordinary civilian offences. In its Concluding Observations on the national periodic report of Guatemala under Article 40 of the ICCPR, the HRC was concerned about such wide jurisdiction as Uganda's military justice legal framework confers to military tribunals. The Committee expressed concern about the broad jurisdiction of military tribunals "...to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts..."[225] It recommended that Guatemala should "…amend the law to limit the jurisdiction of the military courts to the trial of military personnel who are accused of *crimes of an exclusively military nature*."[226] In light of this thesis' finding that Uganda's military tribunals cannot be said to be legally competent, one cannot help but to wonder why they are given such wide jurisdiction over offences of a nonmilitary nature. Military courts in Uganda lack the necessary legal capacity to deal with the legal intricacies and evidential technicalities that most civilian offences present. Moreover, one fails to see how, unless if committed in a military context, offences of a nonmilitary nature negatively impact on the discipline in the armed forces – which is the major reason, advanced for having military justice as a separate system of administration of justice.

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[222] Emphasis added.

[223] Section 179 of the UPDF Act 2005.

[224] Ibid, Section 2 of the UPDF Act.

[225] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Guatemala*, 27 August 2001. CCPR/CO/72/GTM, para.20. Available online at: http://www.unhcr.org/refworld/docid/3be11f934.html [Accessed 1 April 2011].

[226] Ibid. Emphasis added.

Concerning the issue of generally restricting the jurisdiction of military tribunals to only trial of military personnel, the HRC has consistently emphasised that it is incumbent on a State party that does try civilians before military courts to justify the practice.[227] A review of Uganda's military justice legal framework however reveals that military courts are given wide jurisdiction over many categories of civilians without any serious and compelling reason. Under Section 179 of the UPDF Act 2005, any person subject to military law who commits a service offence can be tried by a military court. Under Section 119 of the same law, persons subject to military law include civilians: who serve in the position of an officer or militant in any force raised and maintained outside Uganda and commanded by an officer of the defence forces;[228] who voluntarily accompany any unit or other element of the defence forces which is on service in any place;[229] who serve in the defence forces under engagements by which they agree to be subject to military law;[230] who aid or abet a person subject to military law in commission of a service offence;[231] and every one found in unlawful possession of arms, ammunitions or equipment ordinarily being the monopoly of the defence forces or other classified stores as prescribed.[232] Every person who commits a service offence while subject to military law is also liable to be charged and tried by military tribunals notwithstanding that they have ceased to be

[227] *Madani v. Algeria*, supra note 207. See also, *Benhadj v. Algeria*, U.N.Doc. CCPR/C/90/D/1173/2003 (2007), para.8.8. Principle 5 of the UN Principles on Military Justice, supra note 221, also emphasises that "Military courts should, in principle, have no jurisdiction to try civilians and that in all circumstances, States must ensure that civilians accused of a criminal offence of any nature are tried by civilian courts."

[228] Section 119 (1) d.

[229] Section 119 (1) e. Under Section 119 (13), a person accompanies a unit of the defence forces if he or she: participates with that unit in the carrying out of any of its movements, maneuvers, duties in a disaster or warlike operations; is accommodated or provided with rations at his or her own expense or otherwise by a unit of defence forces in any place designated by the President; is embarked on a vessel or aircraft of a unit of the defence forces; or is a dependent staying with an officer or a militant serving beyond Uganda with that unit.

[230] Section 119 (1) f.

[231] Section 119 (1) g.

[232] Section 119 (1) h. The arms, ammunition and equipment ordinarily the monopoly of the defence forces are spelt out in the Uganda Peoples' Defence Forces (Arms, Ammunition and Equipment Ordinarily the Monopoly of the Defence Forces) Regulations, Statutory Instrument No. 13 0f 2006.

subject to military law since the commission of the offence.[233] This means that retired members of the armed forces and civilians, who cease to be subject to military law, remain liable to be tried by military courts for the service offences they committed while still subject to military law.

From the foregoing analysis, it is without a doubt that Uganda's military justice legal framework confers wide jurisdiction on military tribunals over civilians. This is not only generally inconsistent with the right to a competent tribunal as provided for in the ICCPR, but also contravenes the right of everyone to be tried by ordinary courts as provided for in Principle 5 of the Basic Principles on the Independence of the Judiciary and the right of civilians not to be tried by military courts as provided for in Section G of the African Commission Principles.[234] The important questions that remain to be determined are: Are there any serious compelling reasons in Uganda for conferring upon military courts jurisdiction to try civilians? In particular, are the regular civilian courts unable and inadequate to try the categories of civilians in the above mentioned circumstances? Are other alternative forms of special or high-security civilian courts inadequate to the task of trying those categories of civilians? Is resort to military tribunals unavoidable? In case it is unavoidable, are the military tribunals in position to ensure the full protection of the rights of the accused persons guaranteed by Article 14 of the ICCPR?

In *Madani v. Algeria,* the HRC held that mere invocation of domestic legal provisions for the trial, by a military court, of certain categories of serious offences does not constitute an argument under the ICCPR in support of recourse to trial of civilians by military tribunals.[235] Comparative jurisprudence from the ECrtHR also stresses that it is not sufficient for the national legislation to allocate certain categories of offences to military courts *in abstracto.*"[236] So, the act of Uganda's military justice legal framework giving military tribunals jurisdiction to try civilians for such offences like

[233] Section 119 (8).

[234] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples' Rights at its 33rd Ordinary Session in Niamey-Niger, May 2003, DOC/OS(XXX)247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005).

[235] Supra note 207.

[236] *Martin v. United Kingdom* (2006) 44 EHRR 31, para.44.

unlawful possession of arms, ammunition and equipment ordinarily being the monopoly of the defence forces and all offences where civilians aid or abet a person subject to military law in commission of a service offence[237] is wrong and contravenes the right to a competent tribunal as guaranteed in international human rights law.[238]

Besides, there is no reason whatsoever to suppose that Uganda's regular civilian courts are unable or inadequate to undertake trial of most of the categories of civilian persons subject to military law. Uganda's regular civilian courts are both operationally and legally capable and able to try most of the categories of civilians subject to military law including those accused of serious offences like unlawful possession of arms, ammunition and equipment ordinarily being the monopoly of the defence forces.[239] For a very long time, Uganda's civilian courts have satisfactorily

[237] Section 184 (1) of the UPDF Act provides that a person subject to military who does or omits to do an act for the purpose of aiding any person to commit an offence; abets any person in the commission of an offence; or counsels or procures any person to commit an offence, commits an offence and is, on conviction liable to the same punishment as the person who commits the actual offence. As pointed out earlier, civilians who aid or abet persons subject to military law in the commission of a service offence are by virtue of Section 119 (1) e of the UPDF Act subject to military law and can therefore be tried by military courts.

[238] From the Hansards covering the parliamentary debate leading to the enactment of the UPDF Act 2005, there was no discussion at all about the issue of giving military courts jurisdiction over civilians. But during the parliamentary debate preceding the enactment of the UPDF Act, 1992 – the predecessor of the UPDF Act 2005, some members of Parliament expressed concern over the matter. For instance, regarding the clause which makes persons who accompany any unit or element of the army on service in any place subject to military law, Hon. Rev. Ongora Atwali is quoted to have argued thus "This is where my driver may fall. He may be requested to give a lift. He is already accompanying the Army and because he is not trained in those fields, he may decide on seeing the enemy advancing to drive back. He is [must] be ready to go and answer for this..." See Parliament of Uganda (1991-1992), Parliamentary Debates (HANSARD) Official Report, supra note 208, p.129. Such an innocent driver becomes subject to military law and is liable to face court martial on charges that may include cowardice among other offences. According to Section 120 (1) of the UPDF Act, a person subject to military law who displays cowardice in action (which includes running away from the enemy) commits an offence and is on conviction, where it results in failure of the operation or loss of life, liable to suffer death or, in any other case, liable to life imprisonment.

[239] In terms of civilian contractors and those civilians who accompany army units to outside countries, jurisprudence from the ECrtHR, suggests that difficulties in terms of getting witnesses from the outside

dealt with many serious and sophisticated offences including those involving arms, like armed robberies. Indeed in what may be recognition of the capability and competence of civilian courts to deal with such offences, the Parliament of Uganda recently deemed it fit to confer exclusive jurisdiction of trying persons charged with the offence of terrorism, to the High Court – a civilian court.[240]

In *Attorney General v. Uganda Law Society*,[241] where the General Court Martial tried to assert that it had jurisdiction over the offence of terrorism, the Supreme Court of Uganda held that it did not have such jurisdiction because the Anti-Terrorism Act expressly confers jurisdiction over the offence of terrorism in the High Court alone to the exclusion of other courts. The Court therefore held that the General Court Martial was not a competent court for purposes of trying persons accused of committing the offence of terrorism. Quoting the words of three justices of the Constitutional Court that "…there can be no fair trial within the meaning of Article 28 (1) of the Constitution where the court is not competent,"[242] Justice Mulenga who delivered the unanimous decision of the Supreme Court emphasised that the more accurate statement was that there can be no trial at all where the court is not competent. He stressed that "a trial by an incompetent court is by that fact alone a nullity *ab initio*."[243]

The issue of whether other alternative forms of special or high-security civilian courts are unable and inadequate to try the particular categories of civilians does not arise in Uganda's case because the country does not have such alternative special or high-security civilian courts. But this issue suggests that according to the HRC, in case the

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country to testify in the accused's country civil courts may not be compelling enough to justify the trial of such civilians by military courts in the countries where they may be stationed. In *Martin v. United Kingdom*, supra note 236, para.45, where the House of Lords had found such reasoning to be compelling , the ECrtHR expressed "considerable doubts whether such considerations were sufficiently compelling to justify the trial of a civilian before a military court."

[240] See Section 6 of the Anti-Terrorism Act, 2002.

[241] *Attorney General v. Uganda Law Society*, Constitutional Appeal No.1 of 2006 [2009] UGSC 2 (20 January 2009) Unpublished judgment (on file) Also Available at: http://www.ulii.org/ug/cases/UGSC/ [Accessed on 1 April 2011].

[242] Ibid, p.9.

[243] Ibid.

regular civilian courts are unable and inadequate to try particular categories of civilians, it is better to create special or alternative high-security civilian courts to try such civilians than subject them to the jurisdiction of military tribunals. In the United Kingdom for instance, government enacted legislation which provides for certain categories of civilians such as contractors or dependents of the members of the armed forces living abroad, to be tried by a special court called the Service Civilian Court, whose members do not include military personnel.[244]

With respect to the issue whether the trial of civilians by military tribunals is unavoidable, it is clear from the submission in the foregoing paragraphs that it is not unavoidable. Finally, as a last prong to the test whether the trial of civilians by military tribunals conforms to international human rights law, it has to be demonstrated that the military tribunals are in position to ensure the full protection of the rights of the accused persons guaranteed by Article 14 of the ICCPR. Can this be said to be true in the case of Uganda's military tribunals? The answer is evidently in the negative. Already, it has been established that Uganda's military justice legal framework does not guarantee and ensure the right to a competent tribunal as required by Article 14 (1) of the ICCPR. Sections 4.4.2-4.4.5 will analytically establish that neither does Uganda's military justice legal framework (and therefore the military tribunals) guarantee and ensure the protection of the other rights of accused persons protected under Article 14 of the ICCPR.

One of the important questions that arise from giving military courts jurisdiction over civilians is: If the major objective of military justice is to ensure discipline, morale and good order in the armed forces, why are military tribunals given power to try civilians? In *United States ex rel. Toth v. Quarles,* where an ex-serviceman in the United States Air Force was arrested and taken to Korea to stand trial before court martial on charges of murder and conspiracy to commit murder while he was still an airman, the Supreme Court of United States of America pointed out that it was "...impossible to think that discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefits of a

[244] See the United Kingdom Armed Forces Act 2006, Section 277.

civilian court when they are actually civilians."[245] It stressed that it was not impressed by the fact that some other countries indulge in the practice of subjecting civilians who were once soldiers to trials by courts-martial instead of trials by civilian courts.[246] It emphasised that free countries of the world restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.[247]

In the same case, the Supreme Court of United States of America also held that the constitutional power of Congress in Article I of the Constitution "To make rules for the Government and Regulation of the land and naval forces" did not allow it to give military tribunals jurisdiction over civilians. In the words of Mr. Justice Black who delivered the judgement of Court:

> This Court has held that the Article I clause just quoted authorizes Congress to subject persons actually in the armed service to trial by court-martial for military and naval offenses...It has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions. To allow this extension of military authority would require an extremely broad construction of the language used in the constitutional provision relied on. For, given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces. There is a compelling reason for construing the clause this way: any expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution, where persons on trial are surrounded with more constitutional safeguards than in military tribunals.[248]

From the jurisprudence of the Supreme Court of United States of America quoted above, the provisions of the UPDF Act giving military courts jurisdiction over civilians can further be challenged on the same reasoning. Article 210 of the Constitution of Uganda under which the UPDF Act 2005 was enacted, states in similar terms to Article I of the U.S. Constitution which was in issue in the above case that "*Parliament shall make laws regulating the Uganda Peoples' Defence Forces*

[245] *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955).

[246] Ibid.

[247] Ibid.

[248] Ibid, pp.14-15.

and, in particular providing for – (a) the organs and structures of the Uganda Peoples' Defence Forces; (b) recruitment, appointment, promotion, discipline and removal of members of the Uganda Peoples' Defence Forces and ensuring that members of the Uganda Peoples' Defence Forces are recruited from every district of Uganda; (c) terms and conditions of service of members of the Uganda Peoples Defence Forces; and (d) the deployment of troops outside Uganda."[249] It is submitted that there is nothing in Article 210 reproduced above, which empowers Parliament to give military tribunals jurisdiction over civilians. The UPDF Act provisions giving military tribunals jurisdiction over civilians are therefore not only in violation of the right to a competent tribunal but are also unconstitutional.

The HRC has emphasised that the trial of civilians in military or special courts raises serious problems as far as the equitable, impartial and independent administration of justice is concerned.[250] This is essentially because, as Rowe puts it, "The trial of a civilian by a military court lends itself to the perception that the court is not independent of the executive arm of the government."[251] It is important to recall in this regard, as was discussed in Chapter Two, that although not decisive, perceptions and appearances are very important factors in determining whether or not a tribunal is independent and impartial. But beyond mere perceptions and appearances, the trial of civilians by military rather than civilian courts also raises issues of differential treatment contrary to the right to a fair trial requirement that all persons shall be equal before the courts and tribunals.[252] In this regard, Moeckli has argued that the principle that all persons shall be equal before the courts and tribunals requires that "...all those accused of a crime are offered the same treatment by the criminal justice system. Any deviation from the uniformity of the judicial system is automatically suspect and can only be justified if the state demonstrates the existence of reasonable and objective grounds for trying particular categories of persons before extraordinary tribunals or

[249] Emphasis added.

[250] HRC General Comment 32 (2007), para.22.

[251] Rowe P (2006), supra note 107, p.99. See also Shah S (2008), "The Human Rights Committee and Military Trials of Civilians: *Madani v. Algeria*," *Human Rights Law Review*, Vol.8, No.1, p.147.

[252] Article 14 (1) of the ICCPR.

for applying special rules."[253] It therefore follows, that even if one assumed that Uganda's military tribunals enjoy most of the guarantees of the right to a fair trial as provided for in international human rights law (which it doesn't), when compared to hearings before the regular civilian courts, one cannot deny the fact that the civilians tried by the country's military courts cannot be said to enjoy the same treatment. For instance, depending on whether a civilian is being tried in civil or military court, same offences may attract different penalties. In sum, by giving military courts jurisdiction over civilians, Uganda's military justice legal framework not only violates the right to a competent tribunal as guaranteed in international human rights law but also contravenes the Constitution. Regarding this particular aspect, Uganda's current military justice is, in fact, worse than Uganda's military justice during the colonial times. Uganda's military justice legal frameworks during the colonial times never conferred jurisdiction on military tribunals to try civilians.

Finally, another aspect to fault Uganda's military justice system as far as compliance with the right to a competent tribunal is concerned relates to the issue of jurisdiction over military personnel accused of committing gross human rights violations. As discussed in Chapter Two, the HRC has stressed that military courts are not the most appropriate tribunals for the protection of the rights of citizens in the context where the military itself has violated such rights. It has on a number of occasions recommended to different countries to review the jurisdiction of their military tribunals and transfer their competence in cases concerning the violation of human rights by military personnel, to ordinary courts.[254] Inconsistent with the right to a competent tribunal, Uganda's military justice legal framework confers wide jurisdiction to military tribunals over military personnel for all offences known in Uganda's criminal law including violation of human rights. Section 179 of the UPDF Act 2005 provides that any person subject to military law, who does or omits to do an act in Uganda or outside Uganda, *which constitutes* (*or if it had taken place in Uganda) would constitute an offence under the Penal Code Act or any other*

[253] Moeckli D (2008), *Human Rights and Non-Discrimination in the 'War on Terror'*, Oxford University Press, Oxford, p.134.

[254] See Human Rights Committee, *UN Human Rights Committee: Concluding Observations, Colombia*, 25 September 1992, CCPR/C/79/Add.2, para.394. See also UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Lebanon*, 5 May 1997, CCPR/C/79/Add.78, para.14.

enactment, commits *a service offence and is therefore liable to trial by a military court.*[255] A service offence is defined in Section 2 of the UPDF Act *as an offence under the UPDF Act or any other Act in force*, committed by a person while subject to military law.

respect to matters of administration that relate directly to the exercise of their judicial function. In this Section of the thesis, we analyse the independence of Uganda's military tribunals with respect to these factors. It should be reiterated at this point that the test for independence of tribunals is an objective one. As was pointed out in Chapter Two, the key question is whether given the essential objective conditions or guarantees of judicial independence, an informed and reasonable person would perceive the tribunal to be independent.[259] This is the test that we apply in assessing the compliance of Uganda's military tribunals with the right to an independent tribunal.

Starting with the issue of security of tenure, this means tenure, whether until the age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner.[260] Although judicial officers need not be appointed for life,[261] it is essential that their tenure is fixed for a relatively long period of time.[262] Security of tenure also requires that judicial officers should only be removed or suspended on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the Constitution or the law.[263]

Going by the ECrtHR and House of Lords jurisprudence earlier referred to in Chapter Two, and the Canadian Supreme Court case of *R v. Genereux* which generally point to

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[259] *R v. Genereux* [1992] 1 S.C.R. 259, p.286. In *Findlay v. United Kingdom*, (1997) 24 EHRR 221, para.73, the ECrtHR also stated that "to establish whether a tribunal can be considered as 'independent,' regard must be had inter alia to the manner of appointment of its members and their terms of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence."

[260] *Valente v.The Queen* [1985] 2 S.C.R. 673, p.698. See also Principle 12 of the Basic Principles on the Independence of the Judiciary.

[261] Security of tenure by way of appointment till the age of retirement or for life is generally not desirable in the military justice system. As Justice Lamer rightly pointed out, officers who serve as military judges being members of the military establishment may not wish to be cut off from promotional opportunities within that career system. See *R v. Genereux,* supra note 259, p.304.

[262] Nowak M (2005), *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised edition, NP Engel Publisher, Kehl, p.320.

[263] HRC General Comment 32 (2007), para.20.

the fact that in the context of military justice, the question of security of tenure is most relevant to judge advocates, it is important to first examine whether Uganda's judge advocates have sufficient security of tenure to guarantee their independence in particular, and that of the military courts in general. Surprisingly, the UPDF Act 2005 and the regulations made thereunder are silent about the issue of tenure of the judge advocates. It is submitted that this silence of the law on such an important question prima facie means that judge advocates in Uganda do not enjoy any security of tenure and cannot therefore be said to be independent. As Fidell rightly pointed out, "...a judge who does not know with precision when his or her term will expire is a sitting duck for improper influence."[264]

The above submission notwithstanding, in practice, it is said that the tenure of the judge advocates is the same as that of the members of military courts to which they are appointed, and that this is usually made clear in the instrument of appointment.[265] Members of military courts and the judge advocates are both appointed by the same instrument.[266] Two points should be emphasised about such tenure. First, as shall shortly be argued in respect of the members of military courts, their tenure (for those who have it) which is one year, is too short to guarantee the independence of judicial officers. Secondly, it is not enough that the instruments appointing judge advocates stipulate their tenure. The requirement in international human rights law is to the effect that the tenure of persons who act as judicial officers "*shall be adequately secured by law*"[267] and not in the instruments of appointment which could even be revoked at any time by the appointing authority.

Although it may also be argued that since judge advocates in Uganda are military personnel, they enjoy security of tenure as military officers, this argument too is not tenable. The requirement in international human rights law is that security of tenure must be in respect of their judicial office and not as military officers. The security of tenure of judge advocates as military officers cannot guarantee their independence as

[264] Fidell (1990), supra note 258, p.14.

[265] Email communication on 25 October 2011 from one of the advocates who is a member of the Court Martial Appeal Court. He requested to remain anonymous.

[266] Ibid.

[267] Principle 11 of the Basic Principles on the Independence of the Judiciary. Emphasis added.

they remain subject to military discipline and dependent on the military chain of command and the executive for promotions and other benefits. Dismissing the reasoning that military judges already have practical equivalent of tenure since they can normally serve out a career leading to retirement by reason of longevity, Fidell argues that "that is like saying a civilian judge would be sufficiently protected if he or she were assured of a nonjudicial civil service job until eligible for retirement."[268] He rightly points out that "banishing a judge to a billet that pays the same but does not involve judging is no way to protect either the substance or the appearance of judicial independence."[269]

It is not clear from the Hansards why the drafters of the UPDF Act 2005 did not provide any security of tenure for the judge advocates. As persons given the important judicial responsibilities of advising military courts on issues of law and procedure, the independence and impartiality of judge advocates needs to be selfishly guarded with strong measures that ensure sufficient security of tenure. In sum, Uganda's judge advocates do not enjoy sufficient security of tenure to guarantee their independence and that of the country's military tribunals. This being so, it becomes important to examine whether the members of military courts in Uganda have sufficient security of tenure which if taken together with other safeguards can guarantee their independence and that of the military tribunals.

Unfortunately, the members of Uganda's military courts do not also enjoy sufficient security of tenure to guarantee their independence in particular and that of the military tribunals in general. Starting with the top-most military tribunal i.e., the Court Martial Appeal Court, the UPDF Act and the regulations made thereunder do not stipulate any tenure for the members of this court. Although the tenure for these members could be stipulated in the instruments of appointment, as argued above in respect of the judge advocates, this cannot be secure tenure. The right to an independent tribunal requires that the security of tenure of persons playing judicial roles must be adequately secured by law and not in the instruments of appointment.

[268] Supra note 264, pp.18-19.

[269] Ibid, p.19.

With respect to members of the General Court Martial and Division Courts Martial, as analysed in Section 4.3 above, these are appointed for a period of one year. The HRC previously noted in respect of Armenia that "…the election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality."[270] On his part, the UN Special Rapporteur on the independence of judges and lawyers has argued that a term of five years is too short for security of tenure of judges.[271] While it is appreciated that the tenure of members of military courts need not necessarily be the same as that of civilian judges, on the basis of the above cited authorities, it is submitted that the period of one year is too short to secure sufficient independence of the members of the military courts mentioned above. The fact that all the members of the General Courts Martial and Division Courts Martial are eligible for re-appointment makes the problem even worse.[272] It could be that given their short tenure, the members would work towards pleasing their superiors and the appointing authority than administering justice according to law, so as to secure their re-appointment.[273] This further compromises their independence. Indeed in case of a reappointment, an informed and reasonable person would, more probably than not, conclude that it is because the person reappointed "pleased" or at least did not "disappoint" the appointing authority. This is especially because the law does not specify any grounds or the procedure for the re-appointment of the members of the said military tribunals. This puts the independence of those re-appointed members in serious doubt. The practice moreover reveals that other than re-appointment in the sense of serving a second term immediately after the first term, there are incidents where certain army officers have been repeatedly appointed as members and chairpersons of courts martial after passage of some time. An example is Lt. General

[270] UN Human Rights Committee, *UN Human Rights Committee: Concluding Observations: Armenia*, 19 November 1998. CCPR/C/79/Add.100, para.8.

[271] UN doc. E/CN.4/2000/61/Add.1, Report on the Mission to Guatemala, para.169 (c).

[272] This is not to suggest that the fact of re appointment in itself per se makes the members of military courts less independent. In fact, with proper and sufficient safeguards (which are nonexistent in Uganda's case), eligibility for re appointment can enhance the independence of the members of military tribunals.

[273] In *R v. Genereux*, supra note 259, p.317, Justice Stevenson argued thus "...[a]s the tenured term draws to a close, military judges may wish to secure a re-appointment or advance their careers in some other respect. It would thus be in the interest of those judges to please the "executive."

Ivan Koreta, the current deputy Chief of the UPDF. Over the last two decades, he has served as a member and Chairperson of different military tribunals at different times.

Like in the case of the Court Martial Appeal Court, there is also no stipulated tenure for the members of the Unit Disciplinary Committees. This means that, prima facie, they do not enjoy any security of tenure as required by the right to an independent tribunal and cannot therefore be said to be independent. The fact that half of the members of the Unit Disciplinary Committees are members by virtue of their offices in those Units makes no difference in terms of ensuring their independence. In fact, it is arguable that this very fact compromises their independence even further. After all, they do not serve in those offices for life or for a particular duration. They can be dropped or transferred at any time by the appointing authority and the military hierarchy.

A final aspect about security of tenure of the judge advocates and members of military courts in Uganda worth pointing out is that the country's military justice legal framework is completely silent on the circumstances, let alone the procedure and manner in which they can be removed or suspended before expiry of their tenure, for those who enjoy some tenure. This means that the appointing authority enjoys absolute discretion in the matter. This can greatly compromise their independence. Moreover, removal or suspension of members of military tribunals and judge advocates can take many subtle ways. For instance, whereas members of the General Court Martial and Division Courts Martial are appointed for a period of one year, nothing stops the appointing authority or the military hierarchy from deploying them (during their tenure) to other non-judicial military duties.[274] Without any safeguard, in the opinion of an informed and reasonable person, such a possibility can be used to remove or suspend "unwanted" members of military tribunals from their judicial function. This can adversely affect the independence of members of military courts.

[274] The law very much envisions such circumstances. Thus, in respect of Division Courts Martial and the General Court Martial, Section 198 (c) of the UPDF Act states that "the High Command shall appoint such number of reserve members as it may decide to sit on the court, any of whom may be called upon to sit as a member of the court for the purpose of constituting a full court or realizing quorum."

From the above analysis, it can authoritatively be concluded that both the judge advocates and members of military courts in Uganda do not have sufficient security of tenure to guarantee their independence and that of the courts to which they are appointed. This deficiency also seems to be a remnant of Uganda's early military justice legal frameworks which as was analysed in Chapter Three, never provided any security of tenure for the persons appointed as judge advocates and the members of the military courts. In any case, as was still pointed out in Chapter Three, it should be recalled that the requirement to appoint judge advocates to military tribunals was absent in Uganda's military law until the enactment of the King's African Rifles Ordinance 1958.

With respect to the question of financial security as another essential condition for guaranteeing the right to an independent tribunal, this was considered in *R v. Genereux*[275] to be relevant to both the judge advocates and the members of military tribunals. For this reason, the issue of financial security of the judge advocates and the members of military courts will be analysed together. As was generally pointed out in Chapter Two, financial security requires that persons who perform judicial functions like the judge advocates and members of military courts must enjoy sufficient financial security that ensures that their salaries and other financial remuneration and benefits are not subject to arbitrary interference by the executive, military hierarchy and other appointing authority. The salaries and other financial benefits of Judge advocates and members of military courts as persons who perform judicial functions must be adequately secured by law as required by Principle 11 of the Basic Principles of the Independence of the Judiciary. This necessarily requires that there should be special provisions in the relevant legal framework that guarantee financial security of the judge advocates and members of military courts**.** In *R v. Genereux,* it was held that the requirement of financial security will not be satisfied if the executive is in position to reward or punish the conduct of members of the military tribunal and the judge advocate by granting or withholding benefits in form of promotions and salary increases or bonuses.[276] The pertinent issue to address now therefore is: According to Uganda's current military legal framework, is the executive and the military hierarchy

[275] *R v. Genereux,* supra note 259.

[276] Ibid, p.305.

in a position to reward or punish the conduct of the members of military courts and judge advocates by granting or withholding benefits in the form of promotions and salary increases or bonuses?

In addressing this issue, it is important to highlight that the judge advocates and members of military courts in Uganda are first and foremost serving soldiers of the UPDF. As soldiers, they are then assigned judicial functions. As judge advocates and members of military courts, they are not paid or compensated above their usual salary as soldiers in the UPDF.[277] Salaries and other financial benefits of UPDF soldiers like in many armed forces are largely determined according to status and rank in the army. The question of promotion therefore becomes pertinent to the issue of salaries and other financial benefits of soldiers. According to the UPDF Act, one of the major considerations for promotion and therefore increase in salary and other benefits is performance. Performance is largely determined according to evaluation reports by the commanding officers of the respective soldiers.[278] In *R v. Genereux*, Justice Lamer, delivering the majority decision of the Supreme Court of Canada, correctly noted that "An officer's performance evaluation could potentially reflect his superior's satisfaction or dissatisfaction with his conduct at a court martial."[279] He emphasised that by granting or denying a salary increase or bonus on the basis of a performance evaluation, the executive might effectively reward or punish an officer for his or her performance as a member of military court.[280] This undermines the independence of the judge advocates and members of military courts. In light of the above authority, the following can be noted about Uganda's military justice legal framework.

[277] Informal chat with one of the members of the Court Martial Appeal Court (requested anonymity). This is notwithstanding Section 251 of the UPDF Act which envisages payment of special salaries and allowances to members of military courts. This provision states that "The administrative expenses of military courts, including salaries, allowances, gratuities and pensions payable to or in respect of members of military courts martial other than Field Courts Martial, shall be charged on the Consolidated Fund."

[278] See Section 55 (1) f.

[279] Supra note 259, p.306.

[280] Ibid.

First, there is no formal prohibition in the legal framework against evaluating an officer on the basis of his or her performance at a military court; so that nothing stops a commanding officer from exactly doing that; something that they may actually be doing. After all, performance evaluation reports are confidential.[281] The failure of Uganda's military justice system to formally and expressly prohibit evaluating soldiers for promotional purposes based on their performance at military courts is a big shortcoming in terms of guaranteeing financial security of those members. This is especially so because as judge advocates and members of military court, they are entrusted the duty of adjudicating over cases already considered by commanders and the general military hierarchy as important for ensuring discipline. As such, if they often rule in favour of accused persons, they are likely to disappoint their superiors and the general military hierarchy[282] and as a result, would not get good evaluation for promotional purposes. In that way, the commanding officers, military hierarchy and the executive are in a position to arbitrarily affect the salaries and other benefits of the judge advocates and members of military tribunals. It therefore follows that members of Uganda's military tribunals do not have financial security and cannot therefore be said to be independent.

Second, other than the specific lack of a prohibition against evaluating the judge advocates and members of military tribunals on the basis of their performance at the military courts, there are generally no specific measures in Uganda's military justice legal framework for the determination of conditions of service for the judge advocates and members of military courts as judicial officers as is required by the right to an independent tribunal. For emphasis, Principle 11 of the Basic Principles of Independence of the Judiciary states, inter alia, that "The term of office of judges...adequate remuneration, conditions of service...shall be adequately secured by

[281] Section 55 (1) f of the UPDF Act.

[282] Giving his experience as a former navy defence counsel, prosecutor and military judge who participated in over five hundred court martial cases, Bruton stated thus "...every military judge, no matter how prosecution-oriented, sooner or later must rule against the interests of the Government on an important matter, thereby disappointing or frustrating someone at the command level who may exert a negative influence on the judge's career. In essence, the military is a poor place in which to be a neutral and a very poor place in which to rule in favor of the defense regularly." See Bruton C (1975), "Book Review," *University of Pennsylvania Law Review*, Vol.123, No.6, pp. 1496-1497.

law." The African Commission Principles in Section A also provide, inter alia, that "The tenure, adequate remuneration...conditions of physical and social security... and other conditions of service of judicial officers shall be prescribed and guaranteed by law." It is significant to note that in *Uganda Law Society & Another v. The Attorney General*,[283] the Constitutional Court confirmed that the definition of a "judicial officer" contained in Article 151 of the Constitution includes persons who exercise judicial power in military courts. The conditions of service of persons who exercise judicial power in military courts must therefore also be adequately secured by the law as required by the right to an independent tribunal. It is submitted that given the above-mentioned shortcomings, an informed and reasonable person would more probably conclude that judge advocates and members of military courts in Uganda lack sufficient financial security to guarantee their independence in particular and that of the country's military courts in general.

As far as the question of institutional independence is concerned, this requires that military tribunals must enjoy a status or have sufficient safeguards which guarantee their independence from the military hierarchy and the executive with respect to matters that relate directly to their exercise of judicial function. A critical analysis of Uganda's military justice legal framework however reveals that the executive and the military hierarchy can actually determine or influence certain administrative aspects of military tribunals that relate directly to the exercise of their judicial function. For instance, as already pointed out, the law does not protect members of military courts against deployment to non-judicial military duties during their term of office. It is submitted that through the unfettered discretion and power to deploy members of the military tribunals to non-judicial functions at any time and replacing them with reserve members, the military hierarchy and the executive can technically within certain limits determine who actually finally sits on a court to hear particular matters. This is an administrative matter that directly relate to the exercise of judicial function by military tribunals. Also, the power of the High Command under Section 196 (1) of the UPDF Act 2005 to convene military courts at any time arguably amounts to interference in the administrative matters of military courts.

[283] Supra note 38.

In addition, there are also other issues that put the institutional independence of military courts in Uganda in serious doubt. One such issue relates to the appointing authority of the other key players in the country's military justice system i.e. the prosecutors and the persons who act as judge advocates. One of the important safeguards in ensuring institutional independence of military courts is the requirement that the authority that appoints members of military courts should not be the same to appoint the prosecutors, and that the appointment of persons who act as judge advocates should be in the hands of an independent authority. It is apparent from the examination of Uganda's military justice legal framework that members of military courts and the prosecutors are appointed by the same authority i.e. the High Command.[284] Moreover, the High Command which appoints members of military courts and the prosecutors also has power to convene military courts at any time.[285] It is submitted that given this framework, Uganda's military tribunals are not sufficiently institutionally independent to guarantee the right to an independent tribunal as is required in international human rights law. In *Findlay v. United Kingdom*, the ECrtHR was concerned among other things that the convening officer of the court martial who appointed its members, also appointed the prosecuting officers. It therefore held that Findlay's misgivings about the independence and impartiality of the tribunal were objectively justified.[286] In *R v. Genereux*, delivering the judgment of the Supreme Court of Canada, Justice Lamer stated that "…it is not acceptable that the convening authority, i.e. the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as triers of fact."[287] He held that at a minimum, where the same representative of the Executive (i.e. the convening authority), appoints both the

[284] See Sections 194, 197 and 202 (c) of the UPDF Act. Although according to Regulation 3 of the UPDF (Court-Martial Appeal Court) Regulations, members of the Court Martial Appeal Court are appointed by the Commander-in-Chief on advise of the High Command, it is important to note that according to Section 15 (1) a of the UPDF Act, the Commander-in-Chief is the chairperson of the High Command and is therefore part and parcel of the High Command. Even in the case of the Unit Disciplinary Committees, where the law stipulates that certain office bearers within the Unit become automatic members, the High Command through the military hierarchical structure has power to determine who eventually sits as a member of the Committee.

[285] Section 196 (1).

[286] Supra note 259, para.80.

[287] Supra note 259, p.309.

prosecutor and the triers of fact, the requirements of Section 11 (d) of the Canadian Charter of Rights and Freedoms which provides for the right to an independent and impartial tribunal would not be met.

In *R v. Genereux*, it was also held that the effective appointment of the judge advocate by the executive could, in objective terms, raise a reasonable apprehension as to the independence of the tribunal.[288] The Court stressed that in order to comply with Section 11 (d) of the Canadian Charter of Rights and Freedoms, the appointment of a military officer to sit as a judge advocate at a military tribunal should be in the hands of an independent and impartial judicial officer.[289] In Uganda's case, advocates and para-legals who act as judge advocates at military courts are appointed by the High Command[290] – the same agent of the executive which also appoints members of military tribunals and the prosecutors. Given this structure, there is no doubt that Uganda's military tribunals are not institutionally independent as required by the right to an independent tribunal.

In a nutshell, it follows from the foregoing analysis that Uganda's military justice system as it stands today falls far too short of guaranteeing the right to an independent tribunal as is required by international human rights law and indeed the country's Constitution. The system is still in many respects stuck in its colonial origins, where the independence of military courts was hardly considered a serious issue. While it may be understood and perhaps forgiven why Uganda's colonial military justice system did not guarantee the independence of military courts, in this human rights era, where the country has committed itself to various international and regional human rights instruments to guarantee and protect the independence of courts, the shortcomings analysed above with respect to the independence of military tribunals, are unacceptable.

[288] Ibid.

[289] Ibid.

[290] Section 202 (b).

4.4.3 Compliance with the Right to an Impartial Tribunal

The test for impartiality of tribunals is both subjective and objective. It is subjective in a sense that a tribunal must be free of personal prejudice or bias.[291] It is objective in a sense that a tribunal must appear to reasonable observers to be impartial.[292] A tribunal must offer sufficient guarantees to exclude any legitimate doubts.[293] By its nature, the subjective test depends on each particular case. As the analysis in this Chapter is mainly based on the military justice legal framework and not individual cases, impartiality of Uganda's military tribunals from the subjective point of view is not part of the assessment in this Section. Suffice to emphasise that, however subjectively impartial a tribunal is, it cannot actually be said to be impartial if it is also not impartial from an objective point of view.

Regarding the objective test, one of the important factors to consider in assessing the impartiality of tribunals is their appearance.[294] Thus in *Constitutional Rights Project (in respect of Wahab Akamu, Gbolahan Adeaga and others) v. Nigeria*, where members of a special tribunal consisted of one retired judge, one member of the armed forces and one member of the police force, the ACHPR held that "…regardless of the character of the individual members of such tribunal, *its composition alone creates the appearance, if not actual lack, of impartiality*."[295] This is because the tribunal was essentially composed of persons belonging to the executive branch of government (which passed the decree in question) whose legal competence was also in doubt. As a result, the ACHPR held that the tribunal violated Article 7 (1) d of the African Charter which guarantees the right to an impartial tribunal.[296] Similarly, *in Amnesty International and Others v. Sudan*, where national legislation permitted the President of Sudan, his deputies and senior military officers to appoint special courts to consist of "three military officers or any other persons of integrity and

[291] HRC General Comment 32 (2007), para.21.

[292] Ibid.

[293] *Findlay v. United Kingdom*, supra note 259, para.73.

[294] Ibid, para.76.

[295] *Constitutional Rights Project (in respect of Wahab Akamu, Gbolahan Adeaga and others) v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 60/91 (1995), para.14. Emphasis added.

[296] Ibid.

competence," the ACHPR held that "The composition alone creates the impression, if not the reality, of lack of impartiality and as a consequence, violates Article 7.1 (d) [of the African Charter]."[297]

The pertinent question to pose at this point is: Given the structure and composition of Uganda's military tribunals as highlighted in Section 4.3 above and as partly analysed in this Section above, can an informed and reasonable observer conclude that they are impartial? It is submitted that the answer to this question is in the negative. From the conclusion that Uganda's military tribunals cannot be said to be independent as analysed in Section 4.4.2 above, it is very unlikely that a tribunal which is not independent can be impartial. Tribunals which are institutionally not independent from the executive and the military hierarchy; whose judge advocates and members are military personnel subject to the military discipline and who do not have sufficient security of tenure and financial security cannot be impartial in the eyes of informed and reasonable observers. In *Gunes v. Turkey*,[298] after concluding that the military judges and the army officer in question had satisfied some of the conditions necessary to ensure an independent and impartial tribunal, the ECrtHR nonetheless held that other aspects of their status called into question their independence and impartiality. Like is the case with members of Uganda's military tribunals, the Court pointed out that the military judges in question were servicemen who still belonged to the army, which in turn takes orders from the executive and that they remained subject to military discipline and assessment reports were compiled on them for that purpose.[299] On this basis, the Court argued that the military judges need favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion.[300] Finally, like is the case with the judge advocates and members of Uganda's military tribunals, the ECrtHR pointed out that decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army.[301] It can therefore be safely concluded that from an objective point of view,

[297] *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Communication No. 48/90, 50/91, 89/93 (1999), para.68.

[298] *Gunes v. Turkey*, Application No. 31893/96.

[299] Ibid, para.43.

[300] Ibid.

[301] Ibid.

Uganda's military courts like their predecessors under the country's early military justice legal frameworks, do not meet the requirements of the right to an impartial tribunal.

Before disposing of the issue of compliance of Uganda's military justice with the right to a competent, independent and impartial tribunal, it is important to specifically consider in some detail, the question of summary trials by commanding or senior army officers. As pointed out in Section 4.3.1, under the summary trial authority, in certain circumstances, an accused can be tried by his or her commanding officer or officer commanding or by a superior authority.[302] As was further pointed out in that Section, by virtue of their penal sentencing powers which include detention for a period of up to six months,[303] the right to a fair trial including the right to a competent, independent and partial tribunal applies to the trials by the summary trial authority when dealing with criminal charges. It should also be emphasised that Uganda's military law explicitly classifies summary trial authority as a military court. According to Section 2 of the UPDF Act, it is unequivocally provided that "military court" means a summary trial authority, a Unit Disciplinary Committee or a court martial.

In light of the analysis about the conformity of Uganda's military law with the right to a competent, independent and impartial tribunal made above in this Chapter, it is apparent that where a summary trial authority is involved in determining a criminal charge, it cannot be said to be independent and impartial, nor can it be said to comply with the right to a competent tribunal. The commanding officers (who are agents of the executive and who have interest in the outcome of summary trials) are the ones who proffer charges against an army officer, conduct the investigations, prosecute the case and act as the sole judge in the matter. Moreover these commanding officers do not enjoy any financial security or security of tenure, and are themselves subject to military discipline. Further, the law prohibits legal representation before a summary trial authority and does not provide for any judge advocate to advise the court. Needless to point out, as is apparent, these defects are vestiges of Uganda's early

[302] See Section 191 of the UPDF Act 2005.

[303] Ibid, Section 191 (3) a.

military justice legal frameworks during the colonial times, which as was pointed out in Chapter Three were less concerned with fair trial issues.

An important issue that has been the subject of some considerable litigation before the ECrtHR is whether such defects can be cured by giving an accused soldier: the option to elect trial by a military court which fully complies with the fair trial guarantees and/or the right of appeal from the decision of his/her commanding officer to a military or other court that fully meets the requirements of the right to a fair trial. Regarding the option to elect trial by a military court that meets the requirements of a fair trial, it is argued that by choosing the option to be tried by his or commanding officer, the accused effectively waives his/her right to an independent and impartial tribunal in particular and the right to a fair trial in general. But the waiver must be unequivocal, not run counter to any important public interest and requires minimum guarantees commensurate to the waiver's importance.[304]

Although some case law seems to suggest that depending on the nature of the defects in the summary trial, they could be rectified by the giving the accused soldier the said option and/or right,[305] it is submitted that the option to elect trial by a military court and the right of appeal to a military or other court which complies with the guarantees of the right to a fair trial would not solve the problem. The international human rights law requirement to ensure that courts are competent, independent and impartial applies to all courts not only higher or appellate tribunals.[306] In *De Cubber v.*

[304] See, *Thompson v. United Kingdom*, Application no. 36256/97, Judgement of 15 June 2004, para.43.

[305] See for instance *Bell v. United Kingdom*, Application no. 41534/98, Judgment of 16 January 2007 and *Thompson v. United Kingdom*, Ibid. In the latter case (para.46), while emphasising that the commanding officer in question was central to the prosecution of the charge against the applicant and at the same time was the sole judge in the case, the ECrtHR held that *such defects* could not be corrected by a subsequent review other than a first instance hearing which met the requirements of Article 6 (1) of the ECHR. Emphasis added. Court's final decision in this case finally revolved largely on the fact that there was no valid waiver of the ECHR Article 6 rights by the applicant choosing to be tried by his commanding officer and that, the court martial option would have been presented to the applicant at a time when the court martial system found to violate the independence and impartiality guarantees of Article 6 (1), remained in place.

[306] It is important to re-emphasise that Section 2 of the UPDF Act 2005 unequivocally classifies summary trial authorities as military courts.

Belgium,[307] the ECrtHR supported this position. Referring to Article 6 (1) of the ECHR which provides for the right to an independent and impartial tribunal, the Court correctly argued that:

> Article 6 para. 1 (art. 6-1) concerns primarily courts of first instance; it does not require the existence of courts of further instance. It is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up…However, even when this is the case it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants.[308]

In *Thompson v. United Kingdom*,[309] where Government argued that had the applicant elected to be tried by a court martial, he would have been tried by a court-martial convened under the Armed Forces Act 1996 which fully complied with the independence and impartiality requirements of Article 6 (1) of the ECHR and for which legal representation was allowed, the ECrtHR disregarded such arguments and held that the exclusion of legal representation from the applicant's summary trial constituted a violation of Article 6 (3) c of the ECHR.

Even if it was the position that a court martial that fully complies with the right to a fair trial could correct defects in a summary trial, in Uganda's situation, it cannot happen because as it has already been established in this Chapter the country's military courts are not compliant with the right to a competent, independent and impartial tribunal. Conclusively, in Uganda, the options of trial by a military court or right of appeal from decisions of summary trial authority cannot cure the fair trial deficiencies of summary trials by commanding officers.

4.4.4 Compliance with the Right to a Public Hearing

In Chapter Two, it was established that the right to a public hearing requires that as a general rule, judicial proceedings before military tribunals must be open to the public including the press and that decisions of military tribunals like their civilian counterparts must be in writing, contain at least a statement of the grounds for the

[307] *De Cubber v. Belgium*, Application no. 9186/80, Judgement of 26 October 1984.

[308] Ibid, para.32.

[309] Supra note 304, para.47.

decisions and should generally be available to public. It was also established that the right to a public hearing is subject to five exceptions, i.e., the public including the press may be excluded for reasons of (i) morals, (ii) public order, or (iii) national security in a democratic society, or (iv) when the interest of the private lives of the parties so requires, and (v) where in the opinion of court, publicity would prejudice the interests of justice. In order to achieve the objectives of protecting the right to a public hearing, the exceptions must be strictly interpreted.

In the above connexion, as a departure from its colonial predecessor which was silent about the right to a public hearing, Uganda's current military justice legal framework explicitly provides that "military courts shall be public and, to the extent that accommodation permits, the public shall be admitted to the trial."[310] However, "where a military court considers that it is expedient in the interest of public safety, defence or public morals that the public should be excluded during the whole or any part of a trial, the court may make an order to that effect, and any such order shall be recorded in the record of the proceedings of the military court."[311] While on the face of it the above quoted provisions seem to be compliant with the right to a public hearing as provided for in international human rights law, there are two main aspects that call the compliance of the said provisions with international human rights into question.

First, the provision that the public may be excluded in the interest of "public safety" is noncompliant with the allowable exceptions to the right to a public hearing in international human rights law. The allowable exception in international human rights law and indeed Uganda's Constitution is that the public and the press may be excluded on ground of maintaining "public order" and not "public safety." Although the two concepts may be related, they are not the same. This is especially so given the fact that the allowable exceptions to the right to a public hearing must be strictly interpreted. Exclusion of public from proceedings of court on ground of maintaining public order as one of the allowable exceptions to the right to a public hearing relates primarily to order within the courtroom.[312] It presupposes that courts must justify their decision to exclude the public on the basis of circumstances that can objectively be

[310] Section 212 (1) of the UPDF Act 2005.

[311] Ibid, Section 212 (2).

[312] See Amnesty International (1998), *Fair Trials Manual*, Amnesty International, London, para.14.3.

said to be likely to cause public disorder. Whereas with the concept of public safety, it suffices that a military tribunal is taking preventive measures to ensure public safety. Thus, by allowing military courts to exclude public on grounds of ensuring "public safety" and not "public order" as is required by the exceptions to the right to a public hearing, the UPDF Act gives more grounds for military courts to exclude the public than what is allowable in international human rights law.

Second, in international human rights law, the allowable exceptions to the right to a public hearing are qualified in a way that they must be justifiable or necessary in a democratic society. Article 14 (1) of the ICCPR thus states inter alia that "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security *in a democratic society*..."[313] In this regard, Article 28 (2) of the Constitution of the Republic of Uganda states that "Nothing in clause (1) of this article[314] shall prevent the court or tribunal from excluding the press or the public from all or any proceedings before it for reasons of morality, public order or national security, *as may be necessary in a free and democratic society*."[315] The UPDF Act on the other hand, does not qualify the exceptions to the right to a public hearing with the requirement that such exceptions must be justifiable in a free and democratic society. It thus contravenes the right to a public hearing as guaranteed in international human rights law and indeed Uganda's Constitution.

The requirement that the allowable exceptions to the right to a public hearing must be justifiable in a democratic society is a very important safeguard against abuse of those exceptions under the guise of ensuring morals, public order and national security. In *Charles Onyango Obbo and Anor v. Attorney General*,[316] a case that was concerned with the freedom of expression and speech as guaranteed in Article 29 of Uganda's Constitution, the main issue was whether the Court of Appeal erred in failing to find that Section 50 of the Penal Code Act which criminalises the publication of false news was not demonstrably justifiable in a free and democratic society as required by Article 43 (2) c of the Constitution. Delivering the judgment of the Supreme Court of

[313] Emphasis added.

[314] Clause (1) of Article 28 provides for the right to a public hearing among other rights.

[315] Emphasis added.

[316] Supra note 64.

Uganda, Justice Mulenga stated that Article 43 (2) c is "a limitation upon the limitation."[317] He held that by virtue of Article 43 (2) c, any restrictions on the guaranteed rights in defence of public interest, however rationalised, cannot be valid unless they are acceptable and demonstrably justifiable in a free and democratic society.[318] In *R v. Oakes,*[319] delivering the judgement of the Supreme Court of Canada and elaborating on Section 1 of the Canadian Charter of Rights and Freedoms, which sets out the standard of justification of limitations on the enjoyment of rights guaranteed by the Charter, Justice Dickson stated thus:

> Inclusion of these words ('free and democratic society') as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality … s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification … The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation...

It thus follows that while Uganda's current military justice legal framework explicitly provides for the right to a public hearing unlike its predecessor during the colonial times, the exceptions attached to the right neither comply with international human rights law nor the Constitution of Uganda. This is one other important area which requires reform to ensure compliance of Uganda's military justice system with the country's international human rights obligations as far as ensuring the right to a fair trial s concerned.

4.4.5 Compliance with the Right to a Fair Hearing

The right to a fair hearing lies at the heart of the concept of a fair trial. It is in fact the hall mark of the right to a fair trial. In Chapter Two, it was established that the right to a fair hearing not only requires that all the specific guarantees for the right to a fair

[317] Ibid, p.12.

[318] Ibid.

[319] *R v. Oakes,* 26 D.L.R. (4th) 200.

trial are protected, respected and upheld, but also that in addition, nothing *ejusdem generis* should negatively affect the fairness of a particular trial. In order to determine the fairness of a particular hearing therefore, recourse has to be made not only to the specific guarantees of the right to a fair trial, but also to the conduct of the trial as a whole. The latter being an assessment on a case-by-case basis, is not part of the analysis that follows. Regarding the former, it has already been established that like its colonial predecessor, Uganda's current military justice legal framework is in many ways noncompliant with the right to a competent tribunal, the right to an independent tribunal, the right to an impartial tribunal and the right to a public hearing. The next paragraphs therefore only highlight some of the other areas where Uganda's military justice legal framework is still lacking in terms of complying with the right to a fair hearing as understood in international human rights law.

One such area relates to the right against double jeopardy which is protected by international human rights law and Uganda's Constitution as part of the right to a fair trial. In this regard, Article 14 (7) of the ICCPR provides that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country." An analysis of Uganda's military justice system however reveals that notwithstanding Article 28 (9) of the Constitution and Section 216 of the UPDF Act which protect the right against double jeopardy,[320] the law allows for situations where accused persons can suffer double jeopardy. Under the UPDF Act, the General Court Martial and the High Court have concurrent jurisdiction to try persons subject to military law for commission of certain service offences. There is no prohibition against the General Court Martial to try persons subject to military law for service offences where such persons are undergoing trial in the High Court for similar offences arising from the same facts. The reverse is also true. In fact, the UPDF Act provides that nothing therein stated "affects the jurisdiction of any civil court to try a

[320] Section 216 (1) of the UPDF Act provides that "A person, in respect of whom a charge of having committed a service offence has been dismissed, or who has been found guilty or not guilty either by a military court or civil court on a charge of having committed any such offence, shall not be tried again by any court in respect of that offence or any other offence of which he or she might have been found guilty on that charge.

person for an offence triable by that court."[321] The issue of the UPDF Act allowing for situations where accused persons can suffer double jeopardy arose in *Attorney General v. Uganda Law Society*.[322] In this case, Rtd. Col. Dr. Kiiza Besigye and 22 others were indicted in the High Court for the offence of treason and concealment of treason. While waiting for the commencement of their trial in High Court, they were also charged in the General Court Martial with the offences of terrorism and unlawful possession of firearms. Both the charges in the High Court and the General Court Martial were based on the same facts. In addressing the issue whether these concurrent proceedings were inconsistent with the right against double jeopardy protected by Article 28 (9) of the Constitution, the Supreme Court of Uganda upheld the decision of the Constitutional Court to the effect that the trials were in violation of the right against double jeopardy. In particular, the Court upheld the reasoning of Justice Okello J who argued that the right not to be tried for an offence of which one was previously convicted or acquitted includes the right not to be charged in two different courts for offences arising from the same facts. By allowing for situations where accused persons can suffer double jeopardy, Uganda's military justice system is therefore non-compliant with the right against double jeopardy.

The other major area where Uganda's military justice falls short of complying with the right to a fair hearing relates to the right of appeal. The right of appeal is protected by international human rights law as part of the right to a fair trial by Article 14 (5) of the ICCPR which states that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[323] The UPDF Act however denies persons tried by Field Courts Martial and Summary Trial Authority the right of appeal. In case of the former, the Act provides, inter alia, that "A party to the proceedings of a Unit Disciplinary Committee or court martial other than a Field Court Martial who is not satisfied with its decision shall have the right to appeal to an appellate court..."[324] This in effect denies the persons tried by Field Courts Martial their internationally guaranteed right of appeal. In *Constitutional Rights Project v. Nigeria*, where Section 11 of the Robbery and Firearms (Special

[321] Section 204.

[322] Supra note 241.

[323] See also Section 7 (a) of the African Charter.

[324] Section 227 (1). Emphasis added.

Provisions) Act which provided that "No appeal shall lie from a decision of a tribunal constituted under this Act or from any confirmation or dismissal of such decision by the Governor" was challenged for violating the right to appeal as guaranteed by Article 7 (1) a of the African Charter, it was held by the ACHPR that there was a clear violation of the right of appeal.[325]

With respect to denying persons tried by Summary Trial Authority[326] the right of appeal, Section 207 (1) of the UPDF Act provides that "An appeal from a decision of a summary trial authority shall lie only to the commanding officer or the immediate superior in command of the summary trial authority and, in particular, an appeal from a decision of a superior authority in exercise of original jurisdiction shall lie to the Commander-in-Chief." With respect to the drafters of the UPDF Act, it is submitted that what is provided for under Section 207 (1) is not an appeal within the meaning of the right to appeal as understood in international human rights law. The requirement of the right of appeal in international human rights law is that the appeal should be to a *"higher tribunal established by law*."[327] Commanding officers and the Commander-in-Chief are not tribunals. Moreover the requirement that the appeal should be to "a tribunal" connotes that the tribunal should be independent and impartial[328] which military commanders and the Commander-in-Chief cannot be, as they are presumed to have an interest in matters that are tried by summary trial authorities. The fact that summary trial authorities try only persons accused of committing non capital offences is no reason to deny such persons their internationally guaranteed right of appeal. The HRC has emphasised that the guarantee of the right to appeal provided for in Article 14 (5) of the ICCPR is not only confined to serious offences.[329] The denial of the right of appeal to persons tried by summary trial authority is therefore also a clear violation

[325] *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 60/91 (1995), para.13. See also *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 87/93 (1995), para.11.

[326] For emphasis, according to Section 2 of the UPDF Act, a summary trial authority is classified as a court.

[327] Emphasis added.

[328] HRC General Comment 32 (2007), para.18.

[329] Ibid, para 45.

of international human rights law. Section 207 (1) of the UPDF Act which provides that persons aggrieved by decisions of summary trial authority can appeal to the commanding officer or the immediate superior in command of the summary trial authority[330] is also testimony to the fact that Uganda's military justice system is still stuck in this respect in its colonial origins where commanding officers who in certain instances were given power to preside over military courts also had absolute powers to confirm the findings and sentences of courts martial.

4.5 Conclusion

This Chapter has critically analysed the compliance of Uganda's military justice legal framework with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal as understood in international human rights law. From the constitutional framework point of view, it has been established that, by and large, Uganda's Constitution sufficiently incorporates the provisions of the ICCPR and African Charter concerning the right to a fair and public hearing by a competent, independent and impartial tribunal. The provisions of the right to a fair and public hearing by a competent, independent and impartial tribunal provisions in the ICCPR and the African Charter are therefore part of Uganda's domestic law and are binding on all persons and authorities in Uganda. It has however been established that Uganda's current military justice like its colonial predecessor is in many respects noncompliant with the right to a fair and public hearing by a competent, independent and impartial tribunal.

With respect to the right to a competent tribunal, it has been established that Uganda's military justice legal framework does not provide adequate guarantees to ensure that its military courts are sufficiently legally competent. There is also no legal requirement or safeguard ensuring that people appointed to judicial office in the military tribunals are persons of integrity as is required by international human rights law. Also, inconsistent with the right to a competent tribunal, which generally requires that the jurisdiction of military tribunals should be restricted to offences of a strictly military nature committed by military personnel, military tribunals in Uganda

[330] It should be recalled that according to Section 2 of the UPDF Act 2005, "summary trial authority" means the commanding officer or an officer commanding.

have jurisdiction to try persons subject to military law for commission of both military and non-military offences provided for in the Penal Code Act and other enactments in Uganda.

As regards the issue of trial of civilians by military tribunals, it has been established that inconsistent with international human rights law which emphasises that such trials should be exceptional and justified by objective and serious reasons, and in particular only where the civilian courts are unable to undertake those trials, and only where the military courts fully comply with the right to a fair trial, Uganda's military justice legal framework in *abstracto*, confers wide jurisdiction on military tribunals to try many categories of civilians. These include civilians who: voluntarily accompany any unit or other element of the defence forces which is on service in any place; aid or abet a person subject to military law in commission of a service offence; and those found in unlawful possession of arms, ammunitions or equipment ordinarily being the monopoly of the defence forces. Also, members of the armed forces and civilians who cease to be subject to military law remain liable to be tried by military courts for any service offences they committed while still subject to military law. Moreover, as it has been established, Uganda's military courts are not in position to and cannot ensure the full protection of the rights of accused persons guaranteed in international human rights law.

By giving military tribunals the wide jurisdiction over non-military offences and over civilians, Uganda's current military justice is worse than its predecessors during the colonial times. Uganda's military justice during the colonial times never conferred such wide jurisdiction on military tribunals. Also, inconsistent with the right to a competent tribunal which does not regard military courts to be the most appropriate tribunals to deal with cases involving military personnel accused of committing human rights violations, Uganda's military justice legal framework confers wide jurisdiction on military courts over members of the armed forces for all offences they commit including those involving human rights violations.

As far as the right to an independent tribunal is concerned, it was established that like its predecessors during the colonial times, Uganda's current military justice legal framework falls far too short of guaranteeing the minimum objective conditions for ensuring the independence of the country's military tribunals. In particular, it was

established that from an objective point of view, Uganda's military justice legal framework does not provide the judge advocates and the members of military tribunals sufficient security of tenure and financial security to guarantee their independence. And from an institutional perspective, it was also established that Uganda's military justice legal framework does not guarantee the institutional independence of military tribunals. Within certain limits, the military hierarchy and the executive are in position to determine and influence certain administrative aspects of military tribunals that relate directly to the exercise of their judicial function. For instance, the High Command has the unfettered discretion and power to deploy members of military tribunals to non-judicial functions and replacing them with reserve members. The institutional independence of Uganda's military tribunals is further contestable in that members of the military tribunals, the prosecutors and the judge advocates are all appointed by the High Command which consists of mainly the top military commanders of the UPDF and the President as Commander-in-Chief. From an objective point of view, such an arrangement cannot guarantee the institutional independence of Uganda's military courts from the executive and the military hierarchy. Needless to emphasise, these institutional weaknesses are reminiscent of Uganda's early military justice during the colonial times where, as was pointed out in Chapter Three, the commanding officers who had the power to proffer charges against soldiers, also had the power to convene military courts, the power to appoint the prosecutors and the power to appoint the members of court.

Concerning the right to an impartial tribunal, it was established that reminiscent of the country's military justice during the colonial times, Uganda's military tribunals cannot be said to be impartial as is required by international human rights law. Tribunals that are institutionally not independent; whose legal competence is highly questionable; and whose judge advocates and members are serving military personnel subject to military discipline whose tenure and financial security are not guaranteed cannot be impartial from an objective point of view.

Regarding the right to a public hearing, it was established that unlike military justice during the colonial times, Uganda's current military justice explicitly provides for the right to a public hearing. But the manner in which it is provided for, still falls short of complying with Uganda's international human rights obligations. First, by allowing exclusion of public and the press from proceedings before military tribunals on

grounds of "public safety" and not "public order as required under international human rights law," Uganda's military justice legal framework gives more grounds for military courts to exclude the public than what is allowable in international human rights law. Secondly, as is required in international human rights law, Uganda's military justice legal framework does not qualify the allowable exceptions to the right to a public hearing with the requirement that any exclusion of the public and press from the proceedings of court for reasons of morals, public order or national security must be necessary and justifiable in a democratic society. This renders the allowable exceptions to the right to a public hearing susceptible to abuse by military tribunals.

Finally, with respect to the right to a fair hearing, it was emphasised that in order to determine the fairness of a particular hearing, recourse has to be made not only to the specific guarantees of the right fair trial but also to the conduct of the entire trial. Regarding the former, it was established that similar to Uganda's military justice during the colonial times, Uganda's current military justice legal framework is non-compliant with international human rights law in many respects. It is non-compliant with: the right to a public hearing, the right to a competent tribunal, the right to an independent tribunal, the right to an impartial tribunal, the right against double jeopardy and the right of appeal among others.

In sum, following on Chapter Two which analysed Uganda's international human rights obligations regarding the right to a fair trial in the administration of military justice, and Chapter Three which explored Uganda's military justice over the years with respect to the right to a fair trial, this Chapter has firmly established that despite attempts at reform, Uganda's current military justice system is still, in many ways, stuck in its historical origins and falls far too short of complying with the country's international human rights obligations as far as the right to a fair trial is concerned. This raises the need to consider what recommendations can be adopted to make Uganda's military justice system compliant with the right to a fair trial. But before considering possible recommendations in that regard, it is worth to first briefly explore some of the major implications of noncompliance of Uganda's military justice system with the right to a fair trial. This is the major thrust of the next Chapter.

CHAPTER FIVE

IMPLICATIONS OF THE RIGHT TO A FAIR TRIAL NON-COMPLIANT MILITARY JUSTICE SYSTEM: THE CASE OF *RTD. COL. DR. KIIZA BESIGYE AND THE 22 OTHERS*

In the preceding Chapter, it was established that Uganda's military justice system is still in many ways non-compliant with the right to a fair trial as guaranteed in international human rights law. In this Chapter, using, mainly, the case of *Rtd. Col. Dr. Kiiza Besigye and the 22 others*,[1] we briefly explore some of the major implications of a fair trial non-compliant military justice system on democracy and the rule of law.[2] This case has been chosen as a case study not only because of its political overtones but also because it represents one of the very few cases under Uganda's current military justice legal framework where the country's superior courts of record have been heavily involved. Although the Chapter uses the trial of *Rtd. Col. Dr. Kiiza Besigye and the 22 others* as a case study, it also makes reference to the case of *Major General David Tinyefuza v. Attorney General*[3] to strengthen the analysis of the issues raised. To put the ensuing analysis into context, it is necessary to provide in some detail the relevant facts surrounding the trials of Rtd. Col. Dr. Kiiza Besigye and the 22 others.

[1] Criminal Case No. UPDF/GCM/075/2005.

[2] It is recognised that there are different conceptions of the rule of law. But for purposes of this Chapter, the concept of rule of law is used generally to mean the preeminence of law and the need to respect the law and fundamental human rights and freedoms as fundamentals of any civilized society. This is for instance generally how Sorabjee and Vahanvati use this concept. See Sorabjee S, "Rule of Law: Its Ambit and Dimension," in Madhava M (Ed) (2008), *Rule of Law in a Free Society*, Oxford University Press, New Delhi and Vahanvati G, "Rule of Law: The Sieges Within," in Madhava (2008), ibid, respectively.

[3] *Major General David Tinyefuza v. Attorney General*, Constitutional Petition No.1 of 1996 [1997] UGCC 3 (25 April 1997).

5.1 The Facts

Rtd. Col. Dr. Kiiza Besigye, a trained medical doctor, is the leader of Forum for Democratic Change (FDC), currently the largest opposition political party in Uganda.[4] During the National Resistance Army (NRA) guerrilla war that took place in the early 1980s, and which eventually brought President Museveni's National Resistance Movement (NRM) Government to power in 1986, Besigye as a military officer also worked as President Museveni's personal physcian.[5] With the coming to power of the NRM, President Museveni appointed Dr. Besigye to several ministerial positions[6] and other high ranking offices in the army establishment. In 2000, Besigye officially retired from the army to engage in active politics. But shortly before his retirement, he published a strongly worded article in the media in which he castigated President Museveni's NRM ruling party for being undemocratic, dictatorial, opportunistic, dishonest and corrupt.[7] Rather than constructively responding to Besigye's claims, President Museveni instead threatened him with disciplinary action and prosecution in the military courts.[8] With respect to this threat, Kobusingye observes that threats to prosecute political opponents before military courts was later to become President Museveni's "signature style in dealing with dissent."[9] As Commander-in-Chief, President Museveni also initially refused to accept Besigye's retirement. After some brokering, Besigye was allowed to retire without any disciplinary action or facing the military courts.[10]

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[4] In the 2006 Parliamentary Elections, the party won 37 seats compared to 19 which was the total number of seats that the other four participating opposition political parties won.

[5] International Bar Association (2007), *Judicial Independence Undermined: A Report on Uganda*, London, p.17.

[6] Ibid.

[7] See Besigye K, An Insider's view on how NRM lost the broad base, *Sunday Monitor*, 7 November 1999.

[8] See The New Vision, Museveni Writes To Jeje Over Besigye, 23 November 1999.

[9] See Kobusingye O (2010), *The Correct Line? Uganda under Museveni*, ArthourHouse, Central Milton Keynes, pp.37-38.

[10] The Monitor, Big Party Awaits Besigye Release, 21 September 2000. Also available at http://www.ugandaruralcommunitysupport.org/2000/09/21/big-party-awaits-besigye-release-21-september-2000/ [Accessed on 30 October 2009].

In 2001, Besigye contested for the office of President of the Republic of Uganda but lost to President Museveni in a highly disputed poll. Besigye contested the election results in Uganda's Supreme Court. Although the Supreme Court unanimously ruled that in a significant number of polling stations there was rigging and that in some areas, the principle of free and fair elections was compromised, it refused to nullify the results of the elections.[11] It held by a majority of three to two that it was not proved to its satisfaction that the election malpractices and failure to follow the electoral laws affected the results of the election in a substantial manner.[12] Shortly after this Court ruling, Besigye fled into exile in South Africa, claiming persecution.[13]

Between 2003 and the beginning of 2005, a number of alleged rebels including the 22 who were subsequently charged with Besigye were caught in the Democratic Republic of Congo (DRC) and Uganda.[14] The Government alleged that they had links with the Peoples' Redemption Army (PRA)–a shadowy rebel group that had also been associated with Besigye.[15] On 26 October 2005, Besigye returned to Uganda to contest in the 2006 Presidential elections. On 14 November 2005, three weeks after his return, he was arrested and jointly charged with the 22 others with the offences of treason and concealment of treason,[16] offences they denied committing. Dr. Besigye was also separately charged with the offence of rape allegedly committed in 1997.[17]

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[11] See *Col (Rtd) Dr. Besigye Kiiza v. Museveni Yoweri Kaguta and the Electoral Commission*, Presidential Election Petition No.1 of 2001.

[12] Ibid.

[13] Piron L and Norton A (2004), "Politics and the PRSP Approach: Uganda Case Study," Working Paper 240, Overseas Development Institute, London, p.10.

[14] International Bar Association (2007), supra note 5, p.17. See also Naluwairo, R. (2006), "The Trials and Tribulations of Rtd. Col. Dr. Kiiza Besigye and 22 Others: A Critical Evaluation of the Role of the General Court Martial in the Administration of Justice in Uganda," Working Paper No. 1, HURIPEC Publications, Kampala, p.5.

[15] Ibid.

[16] See High Court Criminal Case No.955 of 2005.

[17] The High Court has since acquitted Dr. Besigye of the rape charges. On 6 March 2006, implying that the rape charges were fabricated, Justice Bosco Katutsi dismissed the case observing that "...the evidence before court was inadequate even to prove a debt; impotent to deprive of a civil right; ridiculous for convicting of the pettiest offence; scandalous if brought forward to support a charge of

The arrest and charging of Dr. Besigye led to demonstrations and riots in Kampala and towns around the country.[18] The demonstrators believed that the charges were designed to stop Besigye from challenging President Museveni in the pending Presidential elections. According to Mwenda, the belief that Besigye's arrest was politically motivated, was shared even by senior NRM leaders.[19] Besigye's arrest also evoked international concern as well as criticism from the local press. Government responded by banning demonstrations, processions, public rallies and assemblies related to the arrest and trial of Besigye and the 22 others.[20] Talk shows and media debates on the matter were also banned, with Dr. James Nsaba Buturo, the Minister of State for Information at the time promising to cancel the license of any media house that did not take heed of the directive.[21]

On 16 November 2005, Besigye and the 22 others appeared in the High Court to make an application for bail. When presiding Justice Edmond Ssempa Lugayizi declared that the accused had a constitutional right to be released on bail and granted conditional bail to fourteen of the accused persons, heavily armed security personnel dressed in black raided the court premises and attempted to force their way into the court's holding cells to pull out the suspects.[22] They interrupted the processing of the bail application and as a result, the bail papers of the suspects could not be processed. All the accused were thus returned to prison. The attack on the High Court premises by the heavily armed security personnel was widely condemned locally and internationally. In the words of the Principal Judge – Justice James Ogoola, the attack was "...the most naked and grotesque violation of the twin doctrines of the rule of law

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any grave character; and monstrous if to ruin the honour of a man who offered himself as a candidate for the highest office of his country." For details of this judgement, see Col *(Rtd) Dr. Kiiza Besigye v. Uganda*, High Court Criminal Session No.149/2005. It is instructive to note that during the trial, it transpired that the rape charge was initiated by President Museveni personally when he instructed the police to "investigate" the matter. See BBC News, Uganda's Besigye cleared of rape, available at http://news.bbc.co.uk/1/hi/world/africa/4781244.stm [Accessed on 5 November 2009].

[18] See for instance AP, Riots in Uganda after main opposition leader arrested, *The Independent*, 16 November 2005. See also Nandutu A, etal...Besigye riots continue, *The Monitor*, 16 November 2005.

[19] Mwenda A, Can Museveni dare release Besigye? *The Monitor*, 22 November 2005.

[20] See Bogere H, Govt Bans Talk on Colonel's Court Case, *The Monitor*, 24 November 2005.

[21] Ibid.

[22] Kobusingye (2010), supra note 9, p.128.

and the independence of the judiciary...it was a naked rape, defilement and desecration of our temple of justice..."[23]

Army spokesperson, Major Felix Kulaigye later informed the public that the heavily armed security personnel had been deployed to re-arrest the PRA suspects to face new charges that had been brought against them in the General Court Martial.[24] All the accused (including Besigye) were subsequently charged in the General Court Martial with the offences of terrorism contrary to the Anti-Terrorism Act[25] and in the alternative with unlawful possession of firearms contrary to the Fire Arms Act.[26] These charges were based on the same facts as the treason charges that were brought against them in the High Court.

A few days after the attack on the High Court by the AK47-wielding security operatives, Justice Lugayizi withdrew from hearing the Besigye cases, citing military interference.[27] Justice James Ogoola, the Principal Judge of the High Court temporarily took over these cases.[28] On 25 November 2005, Dr. Besigye was granted bail by Justice Ogoola in respect of the High Court charges.[29] However, on the basis of a warrant of commitment to stay on remand issued by the General Court Martial, the prison authorities refused to release him.[30] Concurrent trials of the accused in the High Court and the General Court Martial went on until an application was made to the High Court to stay the proceedings in the military court pending the Constitutional Court's decision on the legality of the trial of the accused before the General Court Martial.[31] On 2 December 2005, Ag. Judge Remmy Kasule who took over the

[23] See Mulondo E, Judge Withdraws From Besigye Case, *The Monitor*, 19 November 2005.

[24] See Sseruyange G, Black Mambas intended to re-arrest PRA suspects, *The Monitor*, 17 November, 2005.

[25] According to Section 6 of the Anti-Terrorism Act, 2002, "*The offence of terrorism and any other offence punishable by more than ten years imprisonment under this Act are triable only by the High Court and bail in respect of those offences may be granted only by the High Court*." Emphasis added.

[26] Supra note 1.

[27] International Commission of Jurists (2007), supra note 5, p.18.

[28] Kiirya H, Ogoola Takes Besigye case, *New Vision* 22 November 2005.

[29] Miscellaneous Criminal Applications Nos. 228 and 229 of 2005.

[30] See Bogere H, et al... Besigye gets bail, remains in jail, *The Monitor*, 26 November, 2005.

[31] Prompted by the acts of the State security agencies in raiding the High Court premises and instituting proceedings against the accused persons in the General Court Martial, inter alia, in *Uganda Law*

Besigye cases from Justice James Ogoola issued the injunction ordering the stay of the proceedings in the General Court Martial.[32] But General Elly Tumwine - the Chairperson of the General Court Martial at the time did not take heed of the High Court injunction. He continued with the trial of Dr. Besigye and the 22 others in defiance of the High Court order.[33]

In the meantime, the warrant of commitment to remand Dr. Besigye issued by the General Court Martial expired but was renewed on two occasions. In the subsequent application for a writ of habeas corpus, Justice John Bosco Katutsi ruled that the continued detention of Besigye on a purported warrant of commitment from the General Court Martial was illegal, unlawful and in contempt of the High Court order to release the applicant on bail.[34] He held that from 2nd of December 2005 when Ag. Judge Kasule issued the order staying the proceedings in respect of the PRA suspects, the General Court Martial ceased to have jurisdiction over Dr. Besigye.[35] It could not therefore have validly renewed the warrant of commitment: "If sanity is to be regained the applicant must be given his freedom to be on bail as granted by the Principal Judge…He should be released forthwith unless held on other lawful orders,"[36] ruled Justice Bosco Katutsi. It was after this ruling that Besigye was finally released from remand;[37] hardly two months to the Presidential elections in which he

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Society v. Attorney General, Constitutional Petition No.18 of 2005, Uganda Law Society (ULS) petitioned the Constitutional Court challenging the acts of the State and the jurisdiction of the General Court Martial to try the suspects pointing out among other issues the consequential double jeopardy if both their trial in the military court and High Court were allowed to proceed. See Nyanzi P, PRA Suspects File Petition Over Court Martial Trial, *The Monitor*, 24 November 2005.

[32] For details of Justice Kasule's ruling, see High Court Miscellaneous Cause No.151 and 155 of 2005. See also Muyita S and Mukisa L, High Court Blocks Besigye Army Trial, *The Monitor* 3 December 2005.

[33] See Muyita S and Lubwama S, Court Martial now defies High Court, *The Monitor* 18 January 2006.

[34] See *Rtd. Col. Dr. Kiiza Besigye v. Attorney General*, High Court Miscellaneous Cause No. 161 of 2005.

[35] Ibid.

[36] Ibid.

[37] Muyita S, Kasyate S, Lubwama S, Mukisa L, Bogere H, and Nyakairu F, Besigye Free at Last, *The Monitor*, 2 January 2006.

was a candidate.[38] On 3 February 2006, hardly a month after this ruling, Judge John Bosco Katutsi withdrew from hearing the treason case against Besigye and the other PRA suspects citing pressure and "irresponsible talk" that he was favouring Besigye.[39]

On 31 January 2006, in a public interest petition filed by ULS,[40] the Constitutional Court held that the General Court Martial had no jurisdiction to try the offences which Besigye and his co-accused were charged with. The Constitutional Court also ruled that the General Court Martial could not try people who were at the same time facing similar offences based on the same facts in the High Court. The Court therefore held that the trial of Besigye and his co-accused in the General Court Martial was illegal. Inspite of this pronouncement by the Constitutional Court, the Chairperson of the General Court Martial at the time – General Elly Tumwine insisted on proceeding with the trial to its conclusion.[41] Following the Constitutional Court ruling summarised above, the judiciary came under heavy attack by the military establishment and President Museveni. General David Tinyefuza, a Presidential Advisor and Coordinator of security services accused Ugandan judges of siding with "…wrong doers instead of helping the State."[42] Tinyefuza was also quoted as saying that "…the army would not accept this business of being ordered by judges."[43]

[38] Besigye was nominated Presidential candidate while in detention. The Attorney General had controversially advised the Electoral Commission not to accept Besigye's nomination because "…his conduct was a subject of serious criminal proceedings." The Attorney General argued that although Besigye was presumed innocent until proved guilty, "…it certainly cannot be said that he is on the same level of innocence as that of other Presidential candidates." See Attorney General's correspondence MJ/AG/120, 7 December 2005, addressed to the Chairman of the Electoral Commission. The Electoral Commission however disagreed with him, allowed Besigye's nomination and duly declared him a Presidential Candidate. See Nalugo M and Nandutu A, Electoral Commission okays Besigye's nomination, *The Monitor*, 13 December, 2005.

[39] See The Monitor, Besigye Judge Quits, 4 February 2006.

[40] *Uganda Law Society v. Attorney General*, supra note 30.

[41] See Monitor Team, Defiant Tumwine sets new date for trial, *The Monitor*, 1 February 2006. See also Lubwama S and Kasozi E, Defiant Tumwine conducts illegal trial, *The Monitor*, 15 February 2006.

[42] Muyita S and Nyanzi P, Besigye ruling angers Tinyefuza, *The Monitor*, 3 February 2006.

[43] Ibid.

President Museveni also reacted angrily and vowed to fight the Constitutional Court decision "legally and politically."[44]

After the Presidential elections,[45] in continued defiance of the Constitutional Court's ruling, the General Court Martial ordered Dr. Besigye to reappear before it over the terrorism and possession of illegal arms charges.[46] But in a rather strange turn of events, most probably as a result of both local and international pressure, and in what seemed to imply that he was in charge, President Museveni assured the international community that Besigye would not be tried by the military court.[47] President Museveni was also quoted to have stated that Besigye's 22 co-accused would remain in custody.[48] This is indeed what happened until many of them were forced to apply for amnesty.

In January 2007, proceedings in the General Court Martial against the PRA suspects resumed, but without Dr. Besigye whose name had been removed from the list of the accused.[49] On 12th January 2007, the Constitutional Court delivered its judgement in *(Rtd) Col. Dr. Kiiza Besigye and 22 others v. Attorney General*,[50] reiterating its earlier

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[44] See Mukasa H, Museveni raps ruling on Court Martial, *New Vision* 7 February 2006.

[45] The Presidential elections took place on 23 February 2006. President Museveni was declared winner having won 59.28% of the votes. Besigye who was the runner up won 37.36% of the votes. Besigye contested the results in the Supreme Court on several grounds seeking orders that President Museveni was not validly elected and that a re-run be held or a recount of the votes be conducted. Like its decision in Presidential Election Petition No.1 of 2001, supra note 10, the Supreme Court held that although there was non- compliance of the electoral laws in some instances and that the principle of free and fair elections was compromised by bribery, intimation, multiple voting and vote stuffing in some areas, by a majority of four to three, it refused to grant the orders requested on ground that it was not proved to its satisfaction that the irregularities affected the results in a substantial manner. See *Rtd. Col. Dr. Kizza Besigye v. Electoral Commission and Yoweri Kaguta Museveni*, Presidential Election Petition No. 01 of 2006.

[46] Lubwama S, Besigye Faces Army Court Martial Again, *The Monitor*, 2 March 2006. See also Allio E, Besigye Summoned, *New Vision*, 6 March 2006.

[47] Okore M, Army Court Won't try Besigye – M7, *New Vision*, 8 March 2006.

[48] Ibid.

[49] International Bar Association (2007), supra note 5, p.19.

[50] Constitutional Petition No.12 of 2006. The accused had petitioned the Constitutional Court seeking, inter alia, orders of relief in respect of their continued detention when many of them had been granted

ruling that the trial of the PRA suspects in the military court was illegal. It ordered for their immediate release;[51] an order that the prison authorities refused to comply with. Subsequently, the Commissioner General of Prisons was summoned by the Court to explain his continued reluctance to release the accused.[52] Around the same time, Government appealed against the ruling of the Constitutional Court[53] and also applied to cancel the bail granted to the PRA suspects in November 2005.[54]

On 1 March 2007, during a High Court hearing concerning the Government application to cancel the bail granted to the PRA suspects, the Court ordered that pending determination of that application, the accused should be released pursuant to the original 2005 bail conditions. In a move clearly designed to undermine the High Court order, and reminiscent of the November 2005 court siege, heavily armed security operatives raided the Court and violently re-arrested the PRA suspects, purportedly to answer new charges of murder allegedly committed in 2002 and 2003.[55] As with the first court siege in 2005, this attack on the judiciary was widely condemned globally. For instance in a press release dated 2 March 2007,[56] the International Commission of Jurists expressed concern over the deployment of armed

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bail in respect of the treason trial and when the Constitutional Court had ruled that the General Court Martial did not have power to try them.

[51] Kiirya H and Nsambu H, Release PRA Suspects, Court Orders, *New Vision*, 12 January 2007.

[52] Muyita S and Mukisa L, Court Summons Prisons Chief Over PRA Suspects, *The Monitor*, 17 January 2007.

[53] Muyita S, Govt Appeals Against Release of PRA Suspects, *The Monitor*, 18 January 2007.

[54] *Attorney General and Director of Public Prosecutions v. Patrick Okiring and others*, Miscellaneous Application No.20 0f 2007.

[55] On 18th September 2009, two and a half years from when the PRA suspects were charged with murder, the DPP dropped the charges without giving any serious reasons. See Asiima J and Mazige J, Murder charges against PRA suspects dropped, *The Monitor*, 22 September 2009. See also Kobusingye (2010) supra note 9, pp.151-152. Kobusingye writes that the State never produced a single witness nor any iota of evidence. It gave no details of the persons alleged to have been murdered and that the journalists who tried to track down their families or villages never located any single person who knew of such persons or such murders as the PRA suspects were accused of. Kobusingye, ibid, p.152. The Police officers in Bushenyi, where one of the alleged murders took place confessed that they too never knew anything about the said cases, which seemed to have originated from the office of the DPP, and not with the police. Ibid.

[56] Available at http://www.icj.org/IMG/Uganda.pdf [Accessed on 1 April 2011].

security personnel at the High Court premises and called on Government to respect the independence of the judiciary by ceasing the intimidation of judges and lawyers in the proceedings related to the trial of Dr. Kiiza Besigye and 22 others. The International Commission of Jurists also called on Government to immediately comply with the court orders to release those PRA suspects granted bail. The Human Rights Watch also called on the Uganda Government to stop intimidating the civilian courts with Deputy Africa Director arguing that "The Museveni government's attempt to intimidate the courts shows its profound lack of respect for the law."[57] In protest at the Government's actions in disobeying court orders and violating the sanctity of the court premises, the Judiciary went on a one week strike and demanded an apology from the Executive and assurance that such acts would not be repeated.[58]

With time, in circumstances that were evidently coercive, many of the 22 PRA suspects applied for and were granted amnesty under the Amnesty Act 2000.[59] Bakayana rightly argues that applying for amnesty was the only option available to the PRA suspects to regain their freedom since Government was not ready to release them on court orders.[60] Besigye's young brother – Kifefe Musaasizi is one of the PRA suspects who refused to apply for amnesty. He argued that he would rather die in prison than sign amnesty papers, which would in effect amount to condemning himself for crimes he did not commit.[61] Kifefe later died of unclear health

[57] See Uganda: Government Gunmen storm High Court Again, Human Rights Watch, 5 March 2007, available at http://www.hrw.org/en/news/2007/03/04/uganda-government-gunmen-storm-high-court-again [Accessed on 1 April 2011].

[58] International Bar Association (2007), supra note 5, p.29.

[59] Bakayana I (2007), "The State of Constitutionalism in Uganda" in Kioko W (Ed) (2007), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2007*, Fountain Publishers, Kampala, p.31. See also Kobusingye (2010), supra note 9, p.133. The Amnesty Act provides for admission of guilt and renouncing engaging in rebel activities as preconditions for not being prosecuted and getting released from detention or prison for those in incarceration.

[60] Ibid. It is said that one of the preconditions for the PRA suspects to get "amnesty" was for them to agree to testify against their comrades who refused to apply for amnesty. See Kobusingye (2010), supra note 9, p.131.

[61] See Kobusingye (2010), supra note 9, p.131.

complications shortly after being released on bail on medical grounds. Many people were convinced that the state had a hand in his death.[62]

On 12th October 2010, the Constitutional Court in its judgement in the case of *Dr. Kiiza Besigye and others v. The Attorney General*[63] permanently stayed all the criminal proceedings against the PRA suspects in the High Court, the General Court Martial and the Chief Magistrates courts of Arua and Bushenyi. In their unanimous decision, the justices of the Constitutional Court declared thus:

> We cannot stand by and watch prosecutions mounted and conducted in the midst of such flagrant, egregious and malafide violations of the Constitution and must act to protect the constitutional rights of the petitioners in particular and the citizens of Uganda in general as well as the Rule of Law in Uganda by ordering all the tainted proceedings against the petitioners to stop forthwith and directing the respective courts to discharge the petitioners.[64]

The Court also permanently barred the State from using the process of any court, military or civilian to initiate and prosecute the petitioners in connection with the alleged plot to overthrow the Government by force of arms between December 2001 and December 2004.[65] The Court ruled that given the cumulative effect of the conduct of the State towards the PRA suspects, "No matter how strong the evidence against them may be, no fair trial can be achieved and any subsequent trials would be a waste of time and an abuse of court process."[66] With respect to the attack of the High Court premises and the re-arresting of the PRA suspects by the State security agencies on 1st March 2007, the Court held that that "was an outrageous affront to the Constitution, constitutionalism and the Rule of Law in Uganda."[67] It is against this background that

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[62] See Butagira T, Kifefe's alleged poisoning frightens Opposition, *The Monitor*, 2 December 2007. See also Kobusingye (2010), supra note 9, p.149.

[63] Constitutional Petition No.7 of 2007 [2010] UGCC 6 (12 October 2010).

The PRA suspects in this case had, inter alia, sought a declaration from the Constitutional Court that the cumulative effect of the conduct of the State in matters connected with their trials contravened the right to a fair trial and various provisions of the Constitution and an order to permanently stay all the criminal proceedings they were facing in the different courts.

[64] Ibid, p.54.

[65] Ibid, p.55.

[66] Ibid, p.51.

[67] Ibid.

we now turn to an analysis of some of the major implications of a military justice system that does not conform to the minimum international human rights standards for administering justice embedded in the right to a fair trial.

5.2 Implications for the Rule of Law

The developments highlighted above demonstrate that a fair trial non-compliant military justice system can undermine the rule of law in many respects. First, it can lead to the encroachment and usurpation of the jurisdiction of the ordinary courts. It is of utmost importance in any democratic society that as the major enforcers of the rule of law, the jurisdiction of the ordinary courts of law should be respected and safeguarded against encroachment by other Government organs and agencies. In the case of Rtd. Col. Dr. Kiiza Besigye and the 22 others highlighted above, the General Court Martial aggressively asserted its authority over offences and persons it did not legally have jurisdiction.[68] Even when the Constitutional Court ruled that it did not have jurisdiction to try the accused, the military court insisted on continuing with the trial and indeed continued with the trial up to some time. This greatly undermined the rule of law. It is submitted that a fair trial compliant military justice system (i.e. a system with tribunals that are competent, independent and impartial, inter alia) would have adequate checks and balances to prevent and ensure that military tribunals do not deliberately exceed their mandates by encroaching on the jurisdiction of ordinary courts as was the fact in the case of Rtd. Col. Dr. Kiiza Besigye and the 22 others.

Related to the question of encroachment and usurpation of the jurisdiction of ordinary courts, the case of Rtd. Col. Dr. Kiiza Besigye and the 22 others also demonstrates that a fair trial non-compliant military justice system can result in military tribunals disrespecting, defying and circumventing decisions of ordinary courts which amounts to gross violation of the rule of law. It is a cardinal requirement for ensuring the rule of law that all organs and agencies of the State including the army and the military tribunals strictly abide by the judgments and orders of the judiciary, even when they

[68] As the Supreme Court latter held, the General Court Martial did not have jurisdiction to try the PRA suspects not only because it was not shown that they were subject to military law, but also because Section 6 of the Anti-Terrorism Act, 2002 which creates the offence of terrorism expressly confers exclusive jurisdiction over that offence on the High Court. See *Attorney General v. Uganda Law Society*, Constitutional Appeal No.1 of 2006.

do not agree with them.[69] During the trial of Rtd. Col. Dr. Kizza Besigye and the 22 others, the General Court Martial blatantly disregarded, defied and circumvented several judicial decisions and orders. On 16th November 2005, when some of the PRA suspects were granted bail by the High Court, the General Court Martial circumvented the court decision and defeated the ends of justice by allowing new charges of terrorism and illegal possession of firearms to be instituted against the accused. The General Court Martial then immediately issued a warrant of commitment to remand the PRA suspects thereby defeating the decision of the High Court which granted the accused persons bail.

It will be recalled that the General Court Martial did not have jurisdiction to try the PRA suspects in the first place but vigorously asserted its authority over them. In any case, the charges in the General Court Martial were based on the same facts as the charges the PRA suspects were facing in the High Court. From this perspective, it is arguable that if the General Court Martial was competent, independent and impartial as required by the right to a fair trial, it should not have allowed the charges of terrorism and unlawful possession of firearms to be initiated. These charges should have been instituted in the High Court. Also, in defiance of the High Court order of 2 December 2005, which ordered for the immediate cessation of the General Court Martial hearing against the PRA suspects, the military court continued with the trial for some time. The General Court Martial also defied the 31 January 2006 Constitutional Court ruling which declared illegal its trial of the accused PRA suspects. The defiance and circumvention of court judgments and orders by the General Court Martial greatly undermined the authority of Uganda's civilian courts which they should command in any democratic society as the major enforcers of the rule of law. The General Court Martial's actions therefore greatly undermined the rule of law. A legally competent, independent and impartial military tribunal as required by the right to a fair trial is very unlikely to act the way the General Court Martial did. It would have checks and balances that ensure that the military judges and members of the military courts know and appreciate that their duty is to complement the role of

[69] In fact, Article 128 (3) of Uganda's Constitution imposes an obligation on all organs and agencies of the State to accord to the Courts such assistance as may be required to ensure effectiveness of the courts. This necessarily includes respecting and abiding by the judgements and orders of civilian courts.

the ordinary courts in the administration of justice, and not to undermine their authority.

The case of Rtd. Col. Dr. Kizza Besigye and the 22 others also highlights the point that the right to a fair trial noncompliant military justice system can have serious implications for the protection, respect and enjoyment of individual human rights and fundamental freedoms. It is important to emphasise in this respect that, fundamentally, the rule of law as a dynamic concept is essentially concerned with, and entails, the protection and respect of fundamental human rights and freedoms.[70] The fact of noncompliance with the right to a fair trial is in itself a violation of the fundamental human rights considered key in administering and ensuring justice in a democratic society. But in addition, a fair trial noncompliant military justice system can also easily be manipulated to violate and abuse all other human rights and freedoms. The attempted trial of the PRA suspects by the General Court Martial was not only in violation of their fair trial rights like the right to a competent, independent and impartial tribunal,[71] but the military court also violated their other fundamental rights and freedoms. For instance, although the High Court granted the PRA suspects bail, the General Court Martial curtailed their right to personal liberty by ordering their continued detention, even in circumstances where it did not have power to do so. In respect of Dr. Besigye who was also contesting for Presidency at the time, this forced Justice Bosco Katutsi to angrily order that "*If sanity is to be regained the applicant must be given his freedom to be on bail as granted by the Principal Judge*."[72] He ordered for his immediate release *"...unless held on other lawful orders*."[73]

5.3 Implications for Democracy

The case of Rtd. Col. Dr. Kiiza Besigye and the 22 others also points to the fact that a fair trial non-compliant military justice system can adversely affect democratic processes and advancement of democracy in a country. The case demonstrates the

[70] See Sorabjee (2008), supra note 2, p.7. See also, Vahanvati (2008), supra note 2, p.24.

[71] In Chapter Four, it was established, inter alia, that the legal framework governing Uganda's military courts including the General Court Martial is in very many respects non-compliant with the right to a competent, independent and impartial tribunal.

[72] Supra note 34. Emphasis added.

[73] Ibid. Emphasis added.

possibility that military tribunals that are not sufficiently competent, independent and impartial as required by the right to a fair trial are susceptible to political manipulation. They can easily be manipulated by the Executive to eliminate, silence, intimidate and persecute political opponents. It should be recalled that at the time of his arrest and trials, Besigye had clearly emerged as the most credible and strongest threat to President Museveni's Presidential bid. Given the contempt with which the High Court dismissed the rape charge against Dr. Besigye[74] and the circumstances under which the DPP dropped the murder charges against Besigye's co accused,[75] it is probable that the offences which Besigye was charged with in the General Court Martial were fabricated charges only intended to silence and eliminate him as President Museveni's only credible challenger in the Presidential race.

Given the above, it is curious that the military prosecutor had to wait until it was clear that the High Court was going to grant Dr. Besigye bail in respect of the treason charges, that he then immediately brought new charges of terrorism and unlawful possession of firearms in the General Court Martial; offences which the military court did not have jurisdiction over. Given the fact that the offences which Dr. Besigye and his co accused were charged with in the General Court Martial were based on the same facts as the treason case they were facing in High Court, one would have expected that if the military prosecutor had new evidence necessitating fresh charges, he should have passed it on to the DPP to institute these further charges against the accused in the High Court, especially so that the military court did not even have the jurisdiction to try the offence of terrorism. In any case, these offences were allegedly committed in the early 2000s, yet until the 2006 Presidential race, no charges had ever been lodged against Besigye. The General Court Martial's defiance and circumvention of the civilian court orders including renewing the warrant of commitment to remand Besigye when clearly it did not have power to do so just

[74] Supra note 17. It should be recalled that the rape charges against Besigye were personally initiated by President Museveni who instructed the police to "investigate" the matter. The fact that the President could direct the Police to "investigate" incidents against his political opponents that allegedly occurred a decade ago reinforces the opinion that as the Commander in Chief of the UPDF, he could even do so with more authority and direct how matters in military courts should be handled, especially when such military tribunals are not competent, independent and impartial as required by the right to a fair trial.

[75] Supra note 55.

reinforces the view that perhaps the military court was being politically manipulated to keep Besigye in detention and preoccupied with the trials during the most important democratic process that the country was going through.[76] It is unlikely that a competent, independent and impartial military tribunal would allow itself to be used to adversely affect the advancement of democracy as was apparent in respect of the attempted trial of Rtd. Col. Dr. Kiiza Besigye by the General Court Martial.

To illustrate further how inimical to democracy a fair trial noncompliant military justice system can be used to intimidate, silence and persecute perceived or real political opponents or those with dissenting views from those of the Commander-in-chief and the top military establishment, it is necessary to provide some other examples besides the case of Rtd. Col. Dr. Kiiza Besigye. One example will suffice. In *Major General David Tinyefuza v. Attorney General*,[77] Tinyefuza – a very senior high ranking officer of the UPDF, Presidential advisor on security and Coordinator of security agencies in Uganda petitioned the Constitutional Court for declarations, inter alia, that proceedings of the Parliamentary Sessional Committee on Defence and Internal Affairs are privileged under Article 97 of the Constitution and as such cannot form a basis for any disciplinary action and or criminal/civil action against him in any court of law and/or administrative body of any kind.

Tinyefuza (as Presidential advisor on military affairs at the time) was summoned by the Parliamentary Sessional Committee on Defence and Internal Affairs, to testify before the Committee in connection with the civil strife that was ongoing in Northern Uganda. The Committee was concerned, inter alia, that the civil strife had taken so long to resolve. In the course of his testimony before the Committee, Tinyefuza made a stinging attack on the UPDF, in its conduct generally and in particular, its handling of the insurgency in Northern Uganda. This in essence amounted to challenging

[76] Given our findings in Chapter Four that the General Court Martial like Uganda's other military courts is incompetent and not independent and impartial as required by the right to a fair trial, and given the way it vigorously fought to keep Dr. Besigye (a presidential aspirant) in detention at the time the campaigns were going on, to the extent of disobeying court orders, it was right for some organisations like Uganda Law Society to declare Besigye and his co-accused, Prisoners of Conscience. See Nalugo M and Muyita S, Lawyers to Hold Anti Court Siege Demonstration, *The Monitor*, 22 November 2005.

[77] Supra note 3.

President Museveni, the Commander-in-chief of the UPDF. Tinyefuza's testimony before the Committee (which was widely reported in the local newspapers) did not go well with the President and the top military establishment. The Army commander at the time, Mugisha Muntu, was quoted to have stated that "Tinyefuza was undisciplined and a deviant who should have resigned before testifying."[78] On his part, Hon. Amama Mbabazi, the Minister of State for Defence at the time, is reported to have said, "I do not want to discuss this Tinyefuza issue, but I think he is trying to make a huge mountain from a mole. I think somebody is up to something and Tinyefuza is playing along."[79]

In the meantime, Tinyefuza had been summoned to appear before the High Command for disciplinary action to be taken against him. It turned out in the course of giving evidence in the Constitutional petition that the President had listed several offences under the army code of conduct for which Tinyefuza would have had to answer and had directed the High Command which he Chairs to consider them and recommend action. Tinyefuza subsequently attempted to resign from the army, but the army establishment refused to accept his resignation. On his part, President Museveni who is the Commander-in-chief of the UPDF was reported to have said, "If he [Tinyefuza] wants to go, we shall let him go after he has sorted out his problem with the army. If he committed an offence in the army, he will have to sort out that one first."[80] It was in light of the above that Tinyefuza petitioned the Constitutional Court. The Court rightly held and declared that any threatened disciplinary, administrative, criminal or civil action or actions against the Petitioner in any tribunal, forum or court of law, arising out of his testimony before the Parliamentary Sessional Committee on Defence and Internal Affairs would be unconstitutional as it would violate Article 97 of the constitution.

That Tinyefuza would be summoned to appear before the High Command for disciplinary action over his testimony to the Parliamentary Committee on Defence and Internal Affairs, which testimony was privileged under the Constitution and the

[78] See The New Vision, Army Chief Tells Tinyefuza to Quit, 4th December 1996.

[79] The Sunday Vision, Tinyefuza is upto something, 8th December 1996.

[80] The New Vision, No split in the army over Tinyefuza, 18th December 1996.

National Assembly (Powers and Privileges) Act,[81] reinforces the view that indeed a fair trial noncompliant military justice system (as it has already been established in the case of Uganda) can easily be manipulated to silence, intimidate and persecute those who disagree or challenge the President (who is also Commander-in-chief) and the army establishment. This view in fact came out quite clearly in Tinyefuza's resignation letter from the UPDF which is reproduced in the Court judgement. In relevant parts, Tinyefuza wrote to the President of Uganda, Commander-in-chief of the UPDF and Chairman of the High Command as follows:

> Your Excellency,
> With great difficulty, I have decided to resign as a Member of the Uganda People's Defence Forces and also resign from the UPDF. There are several reasons *but most important among those is that I feel I am unjustly being harrassed over my testimony before that Parliamentary Committee on Defence and Internal Affairs*.[82] To require me to appear before the High Command so that [a]ction is taken against me is rather too high handed…In my view, a Parliamentary Committee on Defence and Internal Affairs has a right to know matters concerning the Army and war. After all that is why it was set up. Article 42 of our Constitution requires that any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a Court of law in respect of any Administrative decision taken against him or her. *I am of the strong view that I will not have that Constitutional right before the UPDF High Command for obvious reasons.*[83] It is therefore, because of the above that I must resign from the Army and subsequently its High Command. I find it unjustified to continue serving in an institution whose bodies I have no faith in or whose views I do not subscribe to.

It is instructive that these words were coming from a very high ranking and senior officer of the UPDF. In essence, Tinyefuza was intimating that he was being persecuted for his views and that even if he was ready to appear and defend himself before the High Command or indeed a military court, he would not get a fair trial. It is also worth pointing out that both President Museveni and his young brother Major General Caleb Akandwanabo, had on numerous previous occasions critised the army's performance in Northern Uganda in language similar (if not more stinging than) that used by Tinyefuza.[84] But the army's reaction to Tinyefuza including threats to court-

[81] Cap 249, Laws of Uganda, 1964.

[82] Emphasis added.

[83] Emphasis added.

[84] Oloka-Onyango J (1993), "Governance, State Structures and Constitutionalism in Contemporary Uganda," Working Paper No.52, Centre for Basic Research Publications, Kampala, p.15.

martial him clearly demonstrates how inimical to democracy, a fair trial noncompliant military justice system can selectively be used to intimidate, silence and or persecute real or perceived opposition.

5.4 Conclusion

The case of Rtd. Col. Dr. Kiiza Besigye and the 22 others clearly demonstrates that a fair trial non-compliant military justice system can have serious negative implications for democracy and the rule of law. The case points to the fact that a fair trial non-compliant military justice system can not only lead to the encroachment and usurpation of the jurisdiction of ordinary courts, but can also lead to the defiance and circumvention of judgments and orders of the civilian courts. This greatly marginalises the role of the civilian courts as the major enforcers of the rule of law. It also undermines the authority of civilian courts which they should command in any democratic society. The Besigye trial saga also demonstrates that instead of working to ensure justice and respect for the fundamental human rights and freedoms, a fair trial non-compliant military system can be used to violate and abuse the rights and fundamental freedoms of accused persons. Finally, inimical to democracy, the trial of Besigye and the 22 others highlights the point that a fair trial non-compliant military justice system is susceptible to political manipulation and can easily be used to silence, eliminate, intimidate and persecute political opponents.

It is for these reasons, inter alia, that it is of utmost importance that military justice should conform to the minimum international human rights standards for the administration of justice embedded in the right to a fair trial. It is in this respect that we now turn to proposing possible recommendations that can help to ensure compliance of Uganda's military justice system with the right to a fair trial.

CHAPTER SIX

RECOMMENDATIONS TOWARDS COMPLIANCE OF UGANDA'S MILITARY JUSTICE SYSTEM WITH THE RIGHT TO A FAIR TRIAL

Our analysis in Chapter Four about the compliance of Uganda's military justice legal framework with the right to a fair trial, and in Chapter Five regarding the implications of a fair trial non-compliant military justice system calls for immediate reform of the country's military justice system. This Chapter proposes major recommendations that can help to ensure compliance of Uganda's military justice system with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. The major challenge in that regard is how to ensure that Uganda's military justice system complies with the right to a fair trial without compromising or undermining military discipline which acceptably is important for ensuring military efficiency.

It is submitted that this requires a fundamental policy shift regarding the main objective and emphasis of military justice in Uganda. Although enforcing military discipline can remain as one of the major objectives of military justice, the administration of military justice should, importantly, be concerned with dispensing justice with respect to the persons subject to military law. Where the two objectives conflict, the objective of ensuring justice should take precedent. It is very difficult to have a military justice system that complies with the international human rights standards for administering justice embedded in the right to a fair trial, where the main objective is not to ensure and dispense justice but to enforce military discipline. Rather, by ensuring that justice is its major objective, the military justice system can as a result promote the much needed military discipline.[1] It is from this perspective that we now make the following recommendations.

[1] This position is supported by a number of academics including many from military circles. See for instance, Fidell ER and Sullivan DH (Eds) (2003), *Evolving Military Justice*, Naval Institute Press, Annapolis, p.38 and Fay JB (1975), "Canadian Military Criminal Law: An Examination of Military Justice," *Chitty's Law Journal*, Vol.23, No.4, p.123. See also Walker J (1994), "Military Justice: From Oxymoron to Aspiration," *Osgoode Hall Law Journal*, Vol.32, No.1, p.25. In fact, according to some writers like General Westmoreland, military courts should not have a dual function as instruments of

6.1 Ensuring the Independence and Impartiality of Uganda's Military Tribunals

This thesis has firmly established that Uganda's military justice legal framework is in many ways noncompliant with the right to an independent tribunal. It falls short of guaranteeing the minimum essential objective conditions for ensuring independence of the military tribunals. It does not provide persons appointed to judicial office in the military justice system with sufficient security of tenure and adequate financial security to guarantee their independence from the military chain of command and the Executive. Also, Uganda's military justice legal framework does not provide sufficient safeguards to guarantee the institutional independence of military tribunals. It is these major loopholes that need to be addressed to ensure compliance of Uganda's military justice system with the right to an independent and impartial tribunal.[2]

It is however important to emphasise the point that the essential objective conditions by which the independence of tribunals can be achieved, i.e. security of tenure, financial security and institutional independence need not be uniform for all courts. The mechanisms that are suitable and necessary to achieve the independence of the superior courts may be highly inappropriate and not necessary in the context of a different tribunal.[3] What is important therefore is that the essence of these conditions is achieved in the different contexts of the different tribunals. It is with this perspective in mind, that we now make the following recommendations.

6.1.1 Guaranteeing the Independence and Impartiality of the Judge Advocates

Before recommending the specific measures that can guarantee the independence and impartiality of the judge advocates, it is important to first briefly reflect on the question whether the judge advocates should be civilians or military personnel. It is

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military discipline and instruments of justice. They should only be instruments of administering justice. See Westmoreland W (1971-1972), "Military Justice – A Commander's View Point," *The American Criminal Law Review*, Vol.10, p.8.

[2] As was pointed out in Chapter Two, the concepts of independence and objective impartiality are closely linked. In this respect, the essential mechanisms by which independence of tribunals can be achieved are equally important for ensuring the objective impartiality of tribunals. For that matter, we deal with the recommendations required to achieve the two objectives together.

[3] *Valente v. The Queen* [1985] 2 S.C.R. 673, p.694.

submitted that while in a number of cases the ECrtHR has rightly emphasised that the presence of a civilian playing the pivotal role of judge advocate constitutes a significant guarantee of independence of courts martial,[4] in the final analysis, the most important thing is whether the judge advocates – civilian or military personnel, have adequate safeguards to ensure their independence. For this reason, it has been considered that in Uganda's case, it will still be acceptable to appoint military personnel as judge advocates as long as their independence is firmly secured.

One of the major ways of securing the independence of military personnel appointed as judge advocates is guaranteeing their security of tenure.[5] Jurisprudence from the ECrtHR indicates that a fixed term of four years may not be sufficient to guarantee the independence of military personnel appointed as judge advocates. In *Incal v. Turkey*,[6] the ECrtHR held, inter alia, that among the things that made the independence of the Izmir National Security Court questionable was the fact that the military judges appointed as members of the Court had a term of office of only four years.[7] On the other hand, in *R v. Genereux*,[8] Lamer CJ rightly cautioned that tenure for a very long time is not generally desirable in the military justice system because the military personnel appointed to judicial office may not wish to be cut off from promotional opportunities within the military career system.[9] It is with the above considerations in mind that we recommend that military officers appointed as judge advocates should be appointed for a renewable fixed term of six years. It is submitted that tenure of six years is sufficient to guarantee their independence and is not too long to cut them off from the promotional opportunities within the military career system.

To avoid their arbitrary removal as judge advocates which could undermine their independence, the law should explicitly state the circumstances and manner under

[4] See for example *Cooper v. United Kingdom* [2003] EHRR 48843/99, para.117 and *Grieves v. United Kingdom*, Application no. 57067/00, Judgment of 16 December 2003, para.89.

[5] See generally *R v. Genereux* [1992] 1 S.C.R. 259, p.304.

[6] *Incal v. Turkey* (2000) 29 EHRR 449.

[7] Ibid, para.68.

[8] Supra note 5.

[9] Ibid, p.304.

which they can be prematurely removed. It is submitted that the grounds for their removal should be similar to those pertaining to the removal of judicial officers in the civilian justice system i.e. they should only be removed prematurely from their offices for: inability to perform the functions of their offices arising from infirmity of the body or mind; misbehavior or misconduct unbecoming of a judicial officer; or incompetence.[10] Except in cases of military exigencies, the law should also require that the judge advocates should not be redeployed or transferred to non-judicial functions which would affect the carrying out of their judicial responsibilities. In such cases, the transfer of a judge advocate to non-judicial functions must be approved by the Principal Military Judge (proposed in Section 6.1.2 below) who must satisfy him or herself as to whether the situation necessitates the redeployment.

It is also recommended that during their tenure, the judge advocates should not be eligible for promotion and should not be subject of any performance related reports as far as their judicial functions are concerned. In a number of cases, the ECrtHR has highlighted such measures to be illustrative of the independence of judge advocates. For example, in *Incal v. Turkey*,[11] while noting that the status of military judges sitting as members of National Security Courts provided certain guarantees of independence and impartiality,[12] the ECrtHR held that their independence was still questionable since, inter alia, they remained servicemen in the army, subject to army discipline and assessment reports were compiled on them by the army.[13]

6.1.2 Guaranteeing the Independence of the Members of Military Tribunals

It may be asked whether since members of military tribunals act as and play roles similar to those of a jury; they require any special measures to guarantee their independence and impartiality. It is submitted that the circumstances under which the military members of military courts operate, justify the need to safeguard them against the ever present possibility of command influence and pressures from the military hierarchy which is not the case with members of an ordinary jury. Therefore, beyond the oath that the members of military tribunals take and the fact that they need

[10] See Article 144 (2) of the Constitution.

[11] Supra note 6.

[12] Ibid, para.67.

[13] Ibid, para.68.

to respect the advice and directives of the judge advocates, they require additional measures to secure their independence and impartiality.

One key measure that we recommend in the above respect is that, other than the Field Courts Martial, the chairpersons of courts-martial and the Unit Disciplinary Committees should also have sufficient security of tenure. It is recommended that they should be appointed for a renewable fixed term of six years and should only be prematurely removed on the same grounds and under the same circumstances as have been recommended in respect of the judge advocates. It is also recommended that they should not be eligible for promotion and should not be subject of any performance related reports as far as their judicial functions are concerned. In *Morris v. United Kingdom*,[14] while declaring that the President of the court martial in question was sufficiently independent of the military chain of command, the ECrtHR noted that his term of office and the *defacto* security of tenure (which meant that he was to remain in office for the next over four years), the fact that he had no apparent concerns as to future army promotion and advancement and was no longer subject to army reports, meant that he was a significant guarantee of independence of the said court.[15]

Aside from the chairpersons, it is recommended that the other members of courts martial, specifically the General Court Martial and Division Courts Martial, should continue with the tenure of one year subject to renewal as is currently the case. But the military members of the Court Martial Appeal Court should have the same tenure as has been proposed in respect of the chairpersons of courts-martial. Additionally, it is recommended that members of military courts should not be subject of any performance related reports as far as their judicial functions are concerned. Considered in their totality, including the safeguards of independence that have been recommended in respect of the judge advocates and the chairpersons of courts-martial and the Unit Disciplinary Committees, these measures should suffice to guarantee the

[14] *Morris v. United Kingdom* [2002] ECHR 38784, para.69.

[15] See also *Cooper v. The United Kingdom*, supra note 4, para.118.

independence and impartiality of the ordinary members of military tribunals in particular,[16] and of Uganda's military courts in general.

6.1.3 Guaranteeing the Institutional Independence of Military Tribunals

One major concern that clearly came out of our analysis in Chapter Four as far as the institutional independence of Uganda's military tribunals is concerned is the failure of the military justice legal framework to guarantee the independence of military prosecutions and the judge Advocates from the military chain of command and the executive. There is no clear separation of the prosecution function and the military chain of command. Also, the manner of appointment of the prosecutors, members of the military tribunal and the judge advocates casts strong doubt as to the institutional independence of Uganda's military tribunals. The High Command which appoints members of military tribunals also appoints the prosecutors and the judge advocates to the different military courts. Moreover the High Command has power to convene any military court at any time. This arrangement greatly compromises the institutional independence of Uganda's military tribunals.

Establish the Office of the Director of Military Prosecutions

To address the above-mentioned shortcomings, it is proposed inter alia, that Uganda's military justice legal framework should establish the office of an independent Director of Military Prosecutions (DMP) along the lines of the office of the Director of Public Prosecutions (DPP) in the civilian criminal justice system. Many countries including United Kingdom, Ireland, Canada and South Africa have established similar offices as one way of enhancing the institutional independence of their military tribunals. In South Africa, in *Minister of Defence v. Potsane*[17] where the establishment of a separate military prosecuting authority was challenged on ground that Section 179 of the Constitution of South Africa created the office of the National Director of Public Prosecutions (NDPP) and vested in it exclusive prosecutorial authority, the Constitutional Court upheld the constitutionality of a separate DMP. The Court held

[16] In *Cooper v. United Kingdom*, ibid, paras.120-126, even without security of tenure, the ECrtHR concluded that the presence of a judge advocate and permanent president of court-martial (who both enjoyed significant safeguards of independence), the prohibition against reporting on the members' judicial performance and the briefing notes to the members were sufficient safeguards of the independence and impartiality of the ordinary members of the court-martial in question.

[17] 2002 1 SA 1 (CC).

that although Section 179 of the Constitution speaks of "a single authority," according to the drafting history, the drafters of the Constitution did not intend to mean "exclusive" or "only," but meant to denote a singular "one." The Court further noted that there were insurmountable problems for the NDPP if it was to control the prosecution within the military context as well, as the two prosecuting authorities serve fundamentally different public objectives.

The office of the DMP would undertake decision making in respect of prosecution of criminal and quasi criminal matters in the military justice system. To preserve their authority in maintaining and enforcing military discipline, the commanders and commanding officers would still retain their power to try and punish by summary trial, those persons accused of committing disciplinary offences. They would also retain the power to determine whether or not to initiate criminal proceedings in respect of military personnel accused of committing criminal and quasi criminal offences. But the final decision as to whether a prosecution by courts martial should proceed, the eventual charges to be proffered and how the prosecution is to be conducted, including withdrawal of charges against accused persons would rest with the Office of the DMP. With the establishment of the office of the DMP, the power to appoint prosecutors to the different military tribunals would be taken away from the High Command and vested in this office. This would help to address the questionable situation where the authority that appoints members of the military courts, also appoints the prosecutors and the judge advocates.

It is proposed that the DMP should be appointed by the President on the recommendation by an independent three-member committee to be comprised of one Supreme Court Judge to be nominated by the Chief Justice, the DPP and one representative of the High Command.[18] The individuals appointed as DMP should be legally competent with qualifications similar to those required of the DPP.[19] In

[18] Ireland recently adopted a similar procedure as one way of safeguarding the independence of the DMP. Section 184D (1) of Ireland's Defence (*Ammendment*) Act, Act No.24 of 2007 provides that for the purpose of identifying officers and informing the Minister of their suitability for appointment as DMP, there shall be established a committee consisting of the Chief of Staff, a judge of the High Court, nominated by the President of the High Court, and the DPP.

[19] According to Article 120 (2) of the Constitution, a person is not qualified to be appointed DPP unless he or she is qualified to be appointed a judge of the High Court. According to Article 143 (1) e, a

addition, the DMP should be knowledgeable and have expertise in military law. Additionally, to safeguard the independence of the office of the DMP, the DMP should enjoy sufficient security of tenure and should be insulated against the military chain of command in other respects. Following *Incal v. Turkey* where the ECrtHR expressed doubt whether a term of four years was sufficient to guarantee the independence of military officers from the military chain of command,[20] it is submitted that the DMP should hold office for a renewable fixed term of six years. The DMP should not be prematurely removed from office except on the same conditions and following the same procedure as pertains to the removal of the DPP.[21] During his or her tenure, the DMP should also not be eligible for promotion and should not be subject to army performance related reports with respect to his or her prosecutorial function. The appointment as DMP should be the last posting in one's military career and like is the case with the DPP, the DMP should be independent in the performance of his functions.[22]

Establish the Office of the Principal Military Judge

In *R v. Genereux*,[23] the Supreme Court of Canada held that the effective appointment of the judge advocate by the executive could in objective terms raise a reasonable apprehension as to the independence of the tribunal. The Court emphasised that in order to comply with the requirement of an independent tribunal, the appointment of a military officer to sit as a judge advocate at a military tribunal should be in the hands

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person qualifies to be appointed a High Court judge if he or she has been a judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court or has practiced as an advocate for a period not less than ten years before a court having unlimited jurisdiction in civil and criminal matters.

[20] Supra note 6.

[21] According to Article 120 (7) of the Constitution, the DPP has the same terms and conditions of service as those of a High Court Judge. Under Article 144 of the Constitution, a High Court Judge can only be removed from office on recommendation of an independent tribunal (comprised of three persons being either judges, former judges or advocates of at least ten years standing) that he or she is unable to perform the functions of his or her office arising from infirmity of the body or mind; misbehaviour or misconduct; or incompetence.

[22] Article 120 (6) of the Constitution provides that in the exercise of the functions conferred on him or her, the DPP shall not be subject to the direction or control of any person or authority.

[23] Supra note 5, p.309.

of an independent and impartial judicial officer.[24] It is on this basis that we propose that Uganda's military justice legal framework should establish the Office of an independent Principal Military Judge (PMJ). This office would be constituted of the PMJ and his staff – the judge advocates. With the establishment of this office, the power to appoint judge advocates to the different military tribunals would be taken away from the High Command and vested in this office. It is recommended that the PMJ should be appointed by the President on recommendation by a three-member committee to comprise of the Attorney General, the Chairperson of the Judicial Service Commission (JSC) and one representative of the High Command.

The PMJ should be appointed for a fixed term of ten years. He or she should only be removable from office on the same conditions and following the same procedure as that proposed in respect of the DMP.[25] In principle, the PMJ can be a civilian, retired military officer or serving military officer. In case of a serving military officer, the appointment as PMJ should be the last posting in one's military career and during his or her tenure, the PMJ should not be eligible for promotion nor be subject to army performance related reports in as far as his or her judicial function is concerned. These measures would act as additional safeguards to shield the PMJ from the command influence and pressure which could potentially undermine his or her independence if he or she were to be concerned with future army promotions and advancement.

6.1.4 Include Civilians in the Composition of Military Tribunals

Starting with the members of the highest military tribunal, i.e. the Court Martial Appeal Court, it is proposed that these should include civilian judges from Uganda's superior courts of record. In particular, it is proposed that the chairperson of the Court Martial Appeal Court should be a civilian judge from the Court of Appeal. In *Cooper v. United Kingdom*,[26] although speaking in respect of a Judge Advocate, the ECrtHR stressed that the presence of a legally qualified civilian, playing a central role in court martial proceedings, constituted not only an important safeguard but one of the most significant guarantees of the independence of the court-martial proceedings.

[24] Ibid.

[25] Supra note 21.

[26] Supra note 4, para.117.

Additionally, we recommend that two of the other four remaining members of the Court Martial Appeal Court should also be civilian judges from the Court of Appeal. With this proposed arrangement of the Court Martial Appeal Court, it is arguable that in relation to voting where there is disagreement on a particular matter, it is likely that the civilian chairperson can use his or her swinging vote more objectively and without bias as opposed to a military chairperson. For the same reasons advanced with regard to the composition of the Court Martial Appeal Court, it is also hereby proposed that the chairperson of the General Court Martial should be a civilian. Three of the other six members of the General Court Martial should also be civilians. In principle, these civilians can be retired military officers.

The inclusion of civilian judges and persons as members of the Court Martial Appeal Court and the General Court Martial would greatly enhance the independence and impartiality of these courts. As persons not subject to military discipline and enjoying constitutional protection as far as their tenure and other terms and conditions of service as judges is concerned, the civilian judges and persons would act as a major guarantee against command influence and pressure which often results from the military chain of command in respect of members of military courts who are serving military officers.

6.2 Complying with the Right to a Competent Tribunal

In Chapter Four, it was established that Uganda's military justice system is non-compliant with the right to a competent tribunal in four major aspects. First, it does not require nor ensure that persons appointed to judicial office in the military justice system have appropriate legal training and qualifications. Nor does it require or ensure that such individuals are persons of integrity. It was also established that contrary to the right to a competent tribunal which generally requires that jurisdiction of military tribunals should be restricted to serving military personnel, Uganda's military justice legal framework gives military tribunals wide jurisdiction to try civilians in a number of circumstances. Finally, inconsistent with international human rights law, which generally does not consider military tribunals to be the most appropriate courts for trying military personnel accused of committing gross human rights violations, Uganda's military justice framework does not limit the jurisdiction

of military courts in that respect. To address these loopholes, we propose the following measures:

6.2.1 Guaranteeing the Legal Competence of Uganda's Military Tribunals

It has already been emphasised that the right to a competent tribunal requires that persons selected for judicial office must be individuals of ability with appropriate training or qualifications in law that enables them to adequately carry out their functions. Since in the military justice context it is mainly the judge advocates that are charged with the responsibility of advising the military courts on issues of law and procedure, more emphasis needs to be placed on them in recommending measures to guarantee the legal competence of Uganda's military tribunals. It is recommended that the judge advocates appointed to the Division Courts Martial and the Unit Disciplinary Committees should be legally qualified advocates with at least six years practical experience. Regarding the General Court Martial, taking into consideration its original and appellate jurisdiction, it is recommended that the judge advocate appointed to this court should be a legally qualified advocate with at least ten years practical experience.

With respect to securing the legal competence of the Court Martial Appeal Court, it has already been proposed that the composition of this Court should include three civilian judges from the Court of Appeal. As regards the military officers appointed as members of this Court, it is submitted that they should be qualified to be appointed as justices of the Court of Appeal i.e. they should either have served as judge of the High Court or court having similar or higher jurisdiction or have practiced as an advocate for a period of not less than ten years before a court having unlimited jurisdiction in civil and criminal matters or should be distinguished jurists or advocates of not less than ten years' standing.[27]

Although at the moment it is recognised that there may be few military personnel with such qualifications and experience, the number could increase with time. The proposed legal requirements may for instance attract legal professionals with high qualifications and experience to join the army in anticipation that they would be easily identified and appointed to serve as members of the Court Martial Appeal Court. In

[27] See Article 143 (1) of the Constitution.

any case, very few military personnel with such qualifications will be required at any particular moment as there is only one Court Martial Appeal Court and the proposal is to have only two military officers as members. Moreover, as it has already been proposed, those military officers will serve as members for a fixed renewable term of six years. In our view, the above proposed legal requirements are sufficient to guarantee the legal competence of the Court Martial Appeal Court. With this level of legal competence, there would be no need to appoint a judge advocate to advise the Court Martial Appeal Court on issues of law and procedure.

To enhance the legal competence of the General Court Martial, Division Courts Martial and Unit Disciplinary Committees further, the role of judge advocates as legally qualified persons should be enhanced. Although they should not have a vote in reaching the final verdict, they should participate in the deliberations leading to the verdict. They should also fully participate and take part in the deliberations on the sentence and should have voting rights in that respect. In all circumstances, the advice of the judge advocates on issues of law and procedure should be binding on the court.

In our view, the legal requirements proposed above suffice to guarantee the legal competence of Uganda's military tribunals. Needless to point out, these measures would also necessarily enhance the independence and impartiality of these courts. In *Incal v. Turkey*,[28] the ECrtHR observed that the status of the military judges who were required to undergo the same professional (legal) training as their civilian counterparts provided certain guarantees of independence and impartiality to the national security court in question.

6.2.2 Limiting the Jurisdiction of Military Tribunals over Civilians

With respect to the question of jurisdiction, it is submitted that Uganda's military tribunals should not have jurisdiction over civilians except in the exceptional circumstances associated with war or in situations where Uganda's ordinary courts are out of reach. But even then, in each case, the civil courts should be unable to undertake the trial of civilians concerned. Except in such circumstances, there is no compelling reason for giving military tribunals jurisdiction to try civilians. Thus, except in the above stated circumstances, the jurisdiction of Uganda's military

[28] Supra note 6, para.67.

tribunals should be restricted to serving military personnel. This would be an important step towards ensuring compliance of Uganda's military justice with the right to a competent tribunal.

6.2.3 Removing the Jurisdiction of Military Tribunals over Military Officers Accused of Committing Human Rights Violations

It was stressed in Chapter Two that international human rights law does not generally consider military tribunals to be the most competent courts for trying military personnel accused of committing gross human rights violation. This is presumably because this amounts to the military investigating and trying itself for abusing the rights of civilians, yet as an institution, the military never wants to be associated with human rights violations. Leaving military tribunals with the jurisdiction over soldiers accused of committing human rights violations in countries like Uganda with a repeated history of military personnel violating peoples' human rights with impunity and where professionalism in the army is still generally questionable, potentially promotes rather than combat impunity.

It is therefore recommended that as one of the measures for ensuring compliance of Uganda's military justice system with the right to a competent tribunal, the country's military justice legal framework should remove the jurisdiction of military tribunals to try persons accused of committing human rights violations and transfer it to the ordinary courts. This will be a very important safeguard against military personnel committing human rights violations with impunity. It would resultantly improve the protection and enjoyment of human rights in the country. It is important to note that although Uganda's military law does not stop civilian courts from trying military personnel accused of committing human rights violation related offences and indeed other general offences,[29] under Section 179 of the UPDF Act 2005, the military courts usually assume primary jurisdiction over military personnel accused of committing any offence under the country's laws.[30] And in most cases, Article 204

[29] Section 204 of the UPDF Act 2005, provides that nothing therein stated "affects the jurisdiction of any civil court to try a person for an offence triable by that court."

[30] This Section provides that any person subject to military law who does or omits to do an act in Uganda or outside Uganda, which constitutes or if it had taken place in Uganda would constitute an

notwithstanding, once the military courts exercise their jurisdiction over a particular case, this effectively extinguishes the jurisdiction of the civil courts over that matter; otherwise, the accused could suffer double jeopardy.

6.2.4 Ensuring the Integrity of Members of Military Courts and the Judge Advocates

As part of the measures necessary to ensure not only the competence, but also the independence and impartiality of tribunals, international human rights law requires that only individuals of integrity should be appointed to judicial office.[31] Uganda's military justice legal framework does not however specifically require members appointed to judicial office in the military justice system to be persons of integrity. It is therefore recommended that Uganda's military law should explicitly require that people appointed as members of military courts or judge advocates should be persons of integrity. Former convicts and lawyers found guilty of professional misconduct by the Law Council should for instance not qualify to be appointed as members of military courts or judge advocates.

6.3 Complying with the Right to a Public Hearing

In order to fully comply with the right to a public hearing, it is proposed that Uganda's military justice legal framework should not exclude the public from the proceedings in military tribunals on grounds of ensuring "public safety." Rather, it should comply with the allowable exception to the right to a public hearing which in this regard only allows exclusion of the public from the proceedings of a tribunal in the interest of maintaining "public order." As argued in Chapter Four, although the concepts of "public safety" and "public order" are related, they are not exactly the

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offence under the Penal Code Act or any other enactment, commits a service offence and is liable to trial by a military court.

[31] See for instance Principle 10 of the Basic Principles on the Independence of the Judiciary [adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, Milan 26 August - 6 September 1985, U.N.Doc. A/conf./121/22/Rev.1, I.B], G.A. Res. 40/146, 13 December 1985, 40 U.N. GAOR Supp. (No.53) 254, U.N. Doc A/40/1007. See also Section A [3] i of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Adopted by the African Commission on Human and Peoples' Rights at its 33rd Ordinary Session in Niamey-Niger, May 2003, DOC/OS(XXX)247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005).

same. Exclusion of the public from proceedings of court on ground of maintaining "public order" presupposes that courts must justify their decision to exclude the public on the basis of circumstances that can objectively be said to be likely to cause public disorder within the courtroom. Whereas with the concept of "public safety," it suffices that a court is taking preventive measures to ensure public safety. This could be based on subjective reasoning and public safety may not necessarily be limited to safety within the courtroom. Thus, exclusion of the public on ground of public safety rather than public order, gives more ground for military tribunals to exclude the public from court proceedings than what is allowed in international human rights law.

Also, as is required by the right to a public hearing as understood in international human rights law, Uganda's military justice legal framework should qualify the allowable exceptions to the right to a public hearing with the requirement that any exclusion of the public from the proceedings of military tribunals on the grounds of maintaining morals, public order or national security must be necessary and justifiable in a democratic society.

6.4 Complying with the Right to a Fair Hearing

As the right to a fair hearing encompasses the protection and respect of all the specific guarantees of the right to a fair trial, it is submitted that all the recommendations made above in this Chapter will contribute to ensuring the compliance of Uganda's military justice system with the right to a fair hearing. But in addition, in Chapter Four, we identified other areas where Uganda's military justice system is lacking in terms of fully complying with the right to a fair trial. In particular, we highlighted that contrary to the right to protection against double jeopardy, Uganda's military justice legal framework allows for situations where persons subject to military law can suffer double jeopardy. We also pointed out instances in which Uganda's military justice legal framework falls short of complying with the right of appeal. To address these deficiencies, we propose the following measures.

6.4.1 Protection Against Double Jeopardy

In order to protect the persons subject to military law from suffering double jeopardy, it is proposed that Uganda's military justice legal framework should require that where an individual is being tried under the civilian criminal justice system, they should not be prosecuted in the military justice system for the same or similar

offences based on the same facts. Similarly, where an individual is being prosecuted under the military justice system, they should not be tried by the civilian courts for the same or similar offences based on the same facts.

6.4.2 Complying with the Right of Appeal

In Chapter Four, it was established that Uganda's military justice legal framework does not allow appeals from decisions of Field Courts Martial and that the mechanism provided for as an appeal in respect of persons tried by Summary Trial Authority cannot amount to exercising one's right of appeal as understood in international human rights law. To address these loopholes, in line with the unanimous decision of the Constitutional Court in *Uganda Law Society and Jackson v. The Attorney General,*[32] Uganda's military law should allow decisions of Field Courts Martial to be appealable. While it is appreciated that allowing appeals from decisions of Field Courts Martial during field operations could in some respects affect those operations, there is no justifiable reason why those decisions should not be appealable when the operations are over. As is the case with the Unit Disciplinary Committees and the Division Courts Martial, it is proposed that decisions of Field Courts Martial should be appealable to the General Court Martial.

As regards guaranteeing the right of appeal with respect to persons tried by the summary trial authority, it is recommended that rather than the aggrieved persons appealing to the commanding officer or immediate superior to the summary trial authority; they should appeal to an independent and impartial tribunal. The fact that in the first place the accused persons have an unfettered right to elect whether to be tried by courts martial or their commanding officers is no justification for denying them

[32]*Uganda Law Society and Jackson v. The Attorney General*, Constitutional Petitions No.02 of 2002 and 08 0f 2002 (Unpublished, on file). In this case, Court held that the silence of the UPDF Act 1992 about the question whether or not decisions of Field Courts Martial were appealable did not mean that they were not appealable. The Court held that by virtue of the fact that the African Charter (which protects the right of appeal) was part and parcel of the Constitution of Uganda, the Kotido Field Court Martial convicts were entitled to an automatic right of appeal and that the denial of that right was unconstitutional. Although this case was concerned with the situation where the military law was silent as to whether decisions of Field Courts Martial were appealable, it is submitted that it is still good authority even for situations where the military justice legal framework explicitly denies the right of appeal in respect of such decisions.

their right of appeal to an independent and impartial tribunal. We recommend establishing a special division of the General Court Martial to be called the Summary Trial Appeals Division to hear and determine the appeals from the Summary Trial Authority. The members of the Summary Trial Appeals Division should enjoy the same security of tenure and must be protected from the military chain of command in other respects as have already been proposed in respect of the other members of the General Court Martial. These measures would suffice to guarantee the right of appeal in respect of persons aggrieved by decisions of Summary Trial Authority.[33]

Finally, as a way of augmenting the right of appeal in Uganda's military justice system generally, it is recommended that the Supreme Court of Uganda should be the court of last resort in respect of matters handled by the country's military justice system. Appeals would thus lie from the Court Martial Appeal Court to the Supreme Court. This proposal is in line with the principle of civilian supremacy over the military which is clearly enshrined in Uganda's Constitution.[34] In this respect, as some military justice scholars rightly point out, it can legitimately be argued that just as the military should be under the ultimate control of civilians, so should the military courts be subjected to the civilian court system.[35] But beyond mere subjection of military justice to the civilian court system, having the Supreme Court as a court of last resort in respect of cases handled by military tribunals can help to act as an additional safeguard for checking any excesses of military courts and correcting any possible miscarriage of justice in the administration of military justice. This would

[33] In bid to comply with the ECHR and the Human Rights Act 1998 as far as the right of appeal and the right to an independent and impartial tribunal is concerned, United Kingdom established a new court altogether (i.e. the Summary Appeals Court) to deal with appeals from the summary proceedings held by commanding officers. For an analysis of the background and workings of this court, see Rowe P (2003), "A New Court to Protect Human Rights in the Armed Forces of the UK," *Journal of Conflict and Security Law*, Vol.8, No.2, pp.201-215.

[34] See Article 208 (2). This Article provides that the Uganda Peoples' Defence Forces shall be nonpartisan, national in character, patriotic, professional, disciplined, productive and subordinate to the civilian authority as established under this Constitution.

[35] See for instance Rowe P (2006), *The Impact of Human Rights Law on Armed Forces, Cambridge University Press*, Cambridge, p.87. See also Office for Democratic Institutions and Human Rights (2008), *Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel*, Organization for Security and Cooperation in Europe, Warsaw, p.229.

resultantly ensure justice and bolster public confidence in the administration of military justice in Uganda.

6.5 Conclusion

This Chapter was essentially concerned with the major reforms required to make Uganda's military justice system compliant with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal. It is submitted that if adopted and effectively implemented, the reforms proposed in this Chapter will go a long way in ensuring compliance of Uganda's military justice with the right to a fair trial as understood in international human rights law. Essentially, the measures proposed herein strike a reasonable and objective balance between the need to enforce military discipline and the obligation to administer justice fairly and ensure that persons subject to military law also truly enjoy their internationally protected right to a fair trial. In any case, as argued in Chapter One, even if no balance was struck between these two objectives, but the military justice system complied with the right to a fair trial, this would help to ensure military discipline.

CHAPTER SEVEN

CONCLUSION

The major objective of this thesis was to assess the compliance of Uganda's military justice system with the right to a fair trial, in particular the right to a fair and public hearing by a competent, independent and impartial tribunal with the view of providing recommendations that can help to ensure that the country's military justice complies with the minimum international human rights standards for the administration of justice. The right to a fair trial constitutes the most important guarantee for ensuring justice in any democratic society. There cannot be justice from a system whose legal framework and tribunals do not protect and guarantee the right to a fair trial. As long as Uganda's military justice system exercises judicial power over criminal offences or matters that are criminal by nature, then, in line with Uganda's international human rights obligations, it must comply with the right to a fair trial.

The only legally acceptable alternative would be to remove the jurisdiction of the military justice system over criminal offences or matters that criminal in nature so that it deals with only disciplinary offences that do not have penal sanctions. While a few countries like Sweden, Denmark and Germany have successfully done this, it may not be feasible or acceptable in Uganda's circumstances (at least at this moment in time) for a number of reasons. First, many Uganda's military units and bases are still isolated from civilian places where the ordinary courts are based. It may therefore still be important for the military tribunals to remain with the jurisdiction over criminal offences to ensure justice and order in those places. Second, the current government is so obsessed with military courts that it is very unlikely to accept the proposal to strip them off the power to hear criminal matters. Also, executing such a reform requires much planning and a lot of reorganization not only on the part of the judiciary, but the entire JLOS and the military authorities. For now therefore, Uganda's military justice system can remain with the jurisdiction over criminal matters but must comply with the right to a fair trial.

It has been firmly established that despite Uganda's military justice system having jurisdiction over criminal offences, its military justice legal framework has very many shortcomings as far as adequately protecting and guaranteeing the right to a fair trial

is concerned. Like its predecessor in the colonial times, Uganda's current military justice legal framework is in many ways inconsistent with the right to a fair trial. For instance, it does not guarantee the legal competence of the military tribunals and the integrity of members and judge advocates appointed to these courts as required by the right to a competent tribunal. Uganda's current military justice legal framework like its predecessors in the colonial times does not also provide adequate measures to guarantee the independence and impartiality of the judge advocates and members of the military tribunals. Nor does it guarantee the institutional independence of Uganda's military tribunals from the military hierarchical command and the executive. Uganda's military justice system also violates the right to a fair and public hearing in many respects. Most of these shortcomings are vestiges of Uganda's early military justice legal frameworks during the colonial times which understandably were less concerned with issues of human rights and justice. But whatever the practice in the colonial times, it is unacceptable that inspite of Uganda's clear international human rights commitments and obligations as far as guaranteeing the right to a fair trial is concerned, the country's military justice system continues to operate in many respects as it were in the colonial era.

To improve the compliance of Uganda's military justice system with the right to a fair trial, a number of recommendations have been made. Key among these recommendations include: requiring certain minimum legal qualifications for persons appointed as judge advocates that all persons appointed to judicial office in the military justice system should be people of integrity; providing sufficient security of tenure for the judge advocates and chairpersons of the military courts; and including civilians in the composition of some courts-martial. Also recommended, is the need to establish the offices of independent DMP and PMJ; limiting the jurisdiction of military tribunals over civilians to only circumstances associated with war or in situations where Uganda's ordinary courts are out of reach; removing the jurisdiction of military tribunals over military officers accused of committing human rights violations; and making the Supreme Court of Uganda the last court of resort in respect of matters handled by the country's military justice system. While some of these recommendations might be seen as costly and reducing on the flexibility currently enjoyed in conducting military business, it is the price which all true democracies committed to fulfilling their international human rights obligations must incur.

Although the military authorities could argue that there is no evidence of the military hierarchical command or the executive exerting pressure on the judge advocates and members of military tribunals or retaliating against them for the judicial decisions they make, this does not mean that command influence and pressure on those members does not actually happen. As Baum and Barry rightly observed, command influence can take so many subtle forms.[1] Yet even if there is no actual command influence or pressure exerted on members of military tribunals, it does not mean that Uganda should not put in place sufficient legal safeguards against their occurrence to guarantee their independence and impartiality. After all, there is evidence of command influence over military judges in many countries including those whose democratic credentials are highly rated. For instance, in his article titled "Military Judges and Military Justice: The Path to Judicial Independence,"[2] Fidell discusses, inter alia, some of the major instances of command influence and retaliation over military judges that have happened in America's military justice history.

On his part, citing some instances of retaliatory transfer of special court martial judges, Sherman observed that although military judges have generally become more judicial and wearing robes in some instances, they remain officers of the service and as such, the changes have not removed them from the ultimate military hierarchical command or from the inherent career pressures towards accommodation in the officer society of a military installation.[3] He pointed out that sometimes, pressure is applied to military judges, especially the lower-ranking special court-martial judges, ranging from criticism by commanders passed on to their superiors in the legal corps to sudden transfers or reassignment to nonjudicial duties.[4] It is therefore important that in line with its international human rights obligations, Uganda undertakes reform of its military justice system to provide for effective measures to safeguard the members of military courts and other judicial officers in the military justice system from the

[1] Baum and Barry (1989), "United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence," *Federal Bar News and Journal*, Vol.36, p.248.

[2] Fidell ER (1990) "Military Judges and Military Justice: The Path to Judicial Independence," *Judicature*, Vol.74, Issue 1, pp.14-20.

[3] Sherman EF (1974), "A Special Kind of Justice," *Yale Law Journal*, Vol.84, p.379.

[4] Ibid.

command influence and pressure and generally ensure that persons subject to Uganda's military law enjoy all the guarantees for a fair trial.

Though the recommendations towards ensuring compliance of Uganda's military justice system with the right to a fair trial made in this thesis relate to the context of improving the administration of military justice in Uganda, they are likely to be very useful and relevant for improving military justice systems in Africa and beyond. For Africa, this is particularly because a number of countries share many things in common as far as the administration of military justice is concerned. African countries generally seem to be lagging behind other jurisdictions in terms of reforming their military justice systems to comply with the international human rights standards for administering justice. This is partly explained by the fact that there is very little research that has been done on the question of military justice and human rights in Africa to trigger informed debate and inform necessary reforms. The analysis, observations, conclusions and recommendations made in this thesis are therefore very important for improving the administration of military justice not only in Uganda but in Africa and beyond.

It is worth noting that some of the measures recommended to help ensure compliance of Uganda's military justice system with the right to a fair trial are not entirely new. They have been tried and tested in other countries like Britain, Canada, Ireland and South Africa and have proved workable. Perhaps most important for this thesis, is the fact that in these countries where some of these measures have been undertaken to improve the administration of military justice, there is hardly any evidence that they compromise military discipline and efficiency. On the contrary, they seem to have improved military discipline and efficiency in the armed forces of the different countries. In fact, in countries like Britain, reforms like civilianisation of military justice were initiated by the military establishment itself.[5] The fear of compromising military discipline and efficiency as reason for the administration of military justice not conforming to the international human rights standards is therefore not tenable. A military justice system that adequately protects and guarantees the right to a fair trial can help to achieve better and sustained discipline in the armed forces – which is the

[5] See generally Rubin GR (2002), "United Kingdom Military Law: Autonomy, Civilianisation, Juridification," *The Modern Law Review*, Vol. 65, No.1, pp.36-57.

major reason advanced for having military justice as a separate system of administration of justice.

The time is therefore now for Uganda to reform its military justice system to ensure that it meets the minimum international human rights standards for administering justice embedded in the right to a fair trial. Compliance of Uganda's military justice system with the right to a fair trial will not only ensure justice for persons subject to military law but will also promote sustainable discipline in the armed forces, advance the rule of law, respect for fundamental human rights and democracy in Uganda.

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APPENDICES

APPENDIX A

Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national

legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

APPENDIX B

African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX) 247, *reprinted in* 12 Int'l Hum. Rts. Rep. 1180 (2005).

PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA

The African Commission on Human and Peoples' Rights;
Recalling its mandate under Article 45(c) of the African Charter on Human and Peoples' Rights (the Charter) "to formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African states may base their legislation";

Recalling Articles 5, 6, 7 and 26 of the Charter, which contain provisions relevant to the right to a fair trial;

Recognising that it is necessary to formulate and lay down principles and rules to further strengthen and supplement the provisions relating to fair trial in the Charter and to reflect international standards;

Recalling the resolution on the Right to Recourse and Fair Trial adopted at its 11th ordinary session in March 1992, the resolution on the Respect and the Strengthening of the Independence of the Judiciary adopted at its 19th ordinary session in March 1996 and the resolution Urging States to Envisage a Moratorium on the Death Penalty adopted at its 26th ordinary session in November 1999;

Recalling also the resolution on the Right to a Fair Trial and Legal Assistance, adopted at its 26th session held in November 1999, in which it decided to prepare general principles and guidelines on the right to a fair trial and legal assistance under the African Charter;

Solemnly proclaims these Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and urges that every effort is made so that they become generally known to everyone in Africa; are promoted and protected by civil society organisations, judges, lawyers, prosecutors, academics and their professional associations; are incorporated into their domestic legislation by State parties to the Charter and respected by them:

A. GENERAL PRINCIPLES APPLICABLE TO ALL LEGAL PROCEEDINGS:

1. Fair and Public Hearing

In the determination of any criminal charge against a person, or of a person's rights and obligations, everyone shall be entitled to a fair and public hearing by a legally constituted competent, independent and impartial judicial body.

2. Fair Hearing

The essential elements of a fair hearing include:

(a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military;

(b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;

(c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;

(d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;

(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

(g) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;

(h) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;

(i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and

(j) an entitlement to an appeal to a higher judicial body.

1. Public hearing:

(a) All the necessary information about the sittings of judicial bodies shall be made available to the public by the judicial body;

(b) A permanent venue for proceedings by judicial bodies shall be established by the State and widely publicised. In the case of ad-hoc judicial bodies, the venue designated for the duration of their proceedings should be made public.

(c) Adequate facilities shall be provided for attendance by interested members of the public;

(d) No limitations shall be placed by the judicial body on the category of people allowed to attend its hearings where the merits of a case are being examined;

(e) Representatives of the media shall be entitled to be present at and report on judicial proceedings except that a judge may restrict or limit the use of cameras during the hearings;

(f) The public and the media may not be excluded from hearings before judicial bodies except if it is determined to be

1. in the interest of justice for the protection of children, witnesses or the identity of victims of sexual violence

2. for reasons of public order or national security in an open and democratic society that respects human rights and the rule of law.

(a) Judicial bodies may take steps or order measures to be taken to protect the identity and dignity of victims of sexual violence, and the identity of witnesses and complainants who may be put at risk by reason of their participation in judicial proceedings.

(b) Judicial bodies may take steps to protect the identity of accused persons, witnesses or complainants where it is in the best interest of a child.

(c) Nothing in these Guidelines shall permit the use of anonymous witnesses, where the judge and the defence is unaware of the witness' identity at trial.

Any judgement rendered in legal proceedings, whether civil or criminal, shall be pronounced in public.

1. Independent tribunal

(a) The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities;

(b) Judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;

(c) The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law;

(d) A judicial body's jurisdiction may be determined, inter alia, by considering where the events involved in the dispute or offence took place, where the property in dispute is located, the place of residence or domicile of the parties and the consent of the parties;

(e) Military or other special tribunals that do not use the duly established procedure of the legal process shall not be created to displace the jurisdiction belonging to the ordinary judicial bodies;

(f) There shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law;

(g) All judicial bodies shall be independent from the executive branch.

(h) The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.

(i) The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability.

(j) Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to:

1. prescribe a minimum age or experience for candidates for judicial office;

2. prescribe a maximum or retirement age or duration of service for judicial officers;

3. prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary;

4. require that only nationals of the state concerned shall be eligible for appointment to judicial office.

(a) No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions.

(b) Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office.

(c) The tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law.

(d) Judicial officers shall not be:

1. liable in civil or criminal proceedings for improper acts or omissions in the exercise of their judicial functions;

2. removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body;

3. appointed under a contract for a fixed term.

(a) Promotion of judicial officials shall be based on objective factors, in particular ability, integrity and experience.

(b) Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties.

(c) Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

(d) The procedures for complaints against and discipline of judicial officials shall be prescribed by law. Complaints against judicial officers shall be processed promptly, expeditiously and fairly.

(e) Judicial officers are entitled to freedom of expression, belief, association and assembly. In exercising these rights, they shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

(f) Judicial officers shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

(g) States may establish independent or administrative mechanisms for monitoring the performance of judicial officers and public reaction to the justice delivery processes of judicial bodies. Such mechanisms, which shall be constituted in equal part of members the judiciary and representatives of the Ministry responsible for judicial affairs, may include processes for judicial bodies receiving and processing complaints against its officers.

(h) States shall endow judicial bodies with adequate resources for the performance of its their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation.

5. Impartial Tribunal

(a) A judicial body shall base its decision only on objective evidence, arguments and facts presented before it. Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.

(b) Any party to proceedings before a judicial body shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness of the judge or judicial body appears to be in doubt.

(c) The impartiality of a judicial body could be determined on the basis of three relevant facts:

1. that the position of the judicial officer allows him or her to play a crucial role in the proceedings;

2. the judicial officer may have expressed an opinion which would influence the decision-making ;

3. the judicial official would have to rule on an action taken in a prior capacity.

(a) The impartiality of a judicial body would be undermined when:

1. a former public prosecutor or legal representative sits as a judicial officer in a case in which he or she prosecuted or represented a party;

2. a judicial official secretly participated in the investigation of a case;

3. a judicial official has some connection with the case or a party to the case;

4. a judicial official sits as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body.

In any of these circumstances, a judicial official would be under an obligation to step down.

(a) A judicial official may not consult a higher official authority before rendering a decision in order to ensure that his or her decision will be upheld.

JUDICIAL TRAINING:

(a) States shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons, victims and other litigants and of human rights and fundamental freedoms recognized by national and international law.

(b) States shall establish, where they do not exist, specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.

(c) States shall ensure that judicial officials receive continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitisation.

C. RIGHT TO AN EFFECTIVE REMEDY:

(a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

(b) The right to an effective remedy includes:

1. access to justice;

2. reparation for the harm suffered;

3. access to the factual information concerning the violations.

(a) Every State has an obligation to ensure that:

1. any person whose rights have been violated, including by persons acting in an official capacity, has an effective remedy by a competent judicial body;

2. any person claiming a right to remedy shall have such a right determined by competent judicial, administrative or legislative authorities;

3. any remedy granted shall be enforced by competent authorities;

4. any state body against which a judicial order or other remedy has been granted shall comply fully with such an order or remedy.

(a) The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.

C. COURT RECORDS AND PUBLIC ACCESS:

(a) All information regarding judicial proceedings shall be accessible to the public, except information or documents that have been specifically determined by judicial officials not to be made public.

(b) States must ensure that proper systems exist for recording all proceedings before judicial bodies, storing such information and making it accessible to the public.

(c) All decisions of judicial bodies must be published and available to everyone throughout the country.

(d) The cost to the public of obtaining records of judicial proceedings or decisions should be kept to a minimum and should not be so high as to amount to a denial of access.

E. LOCUS STANDI:

States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.

F. ROLE OF PROSECUTORS:

(a) States shall ensure that:

1. Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law, including the Charter.

2. Prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

(a) Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, housing, transport, conditions of physical and social security, pension and age of retirement and other conditions of service shall be set out by law or published rules or regulations.

(b) Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

(c) Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.

(d) Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

(e) The office of prosecutors shall be strictly separated from judicial functions.

(f) Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of decisions of judicial bodies and the exercise of other functions as representatives of the public interest.

(g) Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

(h) In the performance of their duties, prosecutors shall:

1. carry out their functions impartially and avoid all political, social, racial, ethnic, religious, cultural, sexual, gender or any other kind of discrimination;

2. protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

3. keep matters in their possession confidential, unless the performance of duty or needs of justice require otherwise;

4. consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the provisions below relating to victims.

(a) Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

(b) Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.

(c) When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the judicial body accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

(d) In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, judicial bodies, the legal profession, paralegals, non-governmental organisations and other government agencies or institutions.

(e) Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors, which allege that they acted in a manner that is inconsistent with professional standards, shall be processed expeditiously and fairly under appropriate procedures prescribed by law. Prosecutors shall have the right to a fair hearing including the right to be represented by a legal representative of their choice. The decision shall be subject to independent review.

(f) Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics.

G. ACCESS TO LAWYERS AND LEGAL SERVICES:

(a) States shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status.

(b) States shall ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar.

(c) States and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms.

G. LEGAL AID AND LEGAL ASSISTANCE:

(a) The accused or a party to a civil case has a right to have legal assistance assigned to him or her in any case where the interest of justice so require, and without payment by the accused or party to a civil case if he or she does not have sufficient means to pay for it.

(b) The interests of justice should be determined by considering:

1. in criminal matters:

i) the seriousness of the offence;

ii) the severity of the sentence.

2. in civil cases:

i) the complexity of the case and the ability of the party to adequately represent himself or herself;

i ii) the rights that are affected;

j iii) the likely impact of the outcome of the case on the wider community.

(a) The interests of justice always require legal assistance for an accused in any capital case, including for appeal, executive clemency, commutation of sentence, amnesty or pardon.

(b) An accused person or a party to a civil case has the right to an effective defence or representation and has a right to choose his or her own legal representative at all stages of the case. They may contest the choice of his or her court-appointed lawyer.

(c) When legal assistance is provided by a judicial body, the lawyer appointed shall:

1. be qualified to represent and defend the accused or a party to a civil case;

2. have the necessary training and experience corresponding to the nature and seriousness of the matter;

3. be free to exercise his or her professional judgement in a professional manner free of influence of the State or the judicial body;

4. advocate in favour of the accused or party to a civil case;

5. be sufficiently compensated to provide an incentive to accord the accused or party to a civil case adequate and effective representation.

(a) Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources, and shall ensure that:

1. when legal assistance is provided by the judicial body, lawyers with the experience and competence commensurate with the nature of the case make themselves available to represent an accused person or party to a civil case;

2. where legal assistance is not provided by the judicial body in important or serious human rights cases, they provide legal representation to the accused or party in a civil case, without any payment by him or her.

(a) Given the fact that in many States the number of qualified lawyers is low, States should recognize the role that para-legals could play in the provision of legal assistance and establish the legal framework to enable them to provide basic legal assistance.

(b) States should, in conjunction with the legal profession and non-governmental organizations, establish training, the qualification procedures and rules governing the activities and conduct of para-legals. States shall adopt legislation to grant appropriate recognition to para-legals.

(c) Para-legals could provide essential legal assistance to indigent persons, especially in rural communities and would be the link with the legal profession.

(d) Non-governmental organizations should be encouraged to establish legal assistance programmes and to train para-legals.

(e) States that recognize the role of para-legals should ensure that they are granted similar rights and facilities afforded to lawyers, to the extent necessary to enable them to carry out their functions with independence.

G. INDEPENDENCE OF LAWYERS:

(a) States, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

(b) States shall ensure that lawyers:

1. are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;

2. are able to travel and to consult with their clients freely both within their own country and abroad;

3. shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

(a) States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

(b) It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

(c) Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a judicial body or other legal or administrative authority.

(d) Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

(e) Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

(f) Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

(g) Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

(h) Lawyers shall always loyally respect the interests of their clients.

(i) Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and the protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

(j) Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional association shall be elected by its members and shall exercise its functions without external interference.

(k) Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

(l) Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

(m) Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or even before a judicial body, and shall be subject to an independent judicial review.

(n) All disciplinary proceedings shall be determined in accordance with the code of professional conduct, other recognized standards and ethics of the legal profession and international standards.

G. CROSS BORDER COLLABORATION AMONGST LEGAL PROFESSIONALS:

(a) States shall ensure that national legislation does not prevent collaboration amongst legal professionals in countries in their region and throughout Africa.

(b) States shall encourage the establishment of agreements amongst states and professional legal associations in their region that permit cross-border collaboration amongst lawyers including legal representation, training and education, and exchange of information and expertise.

G. ACCESS TO JUDICIAL SERVICES:

(a) States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

(b) States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with the special needs and requirements of women.

(c) In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.

(d) States shall ensure that access to judicial services is not impeded including by the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.

G. RIGHT OF CIVILIANS NOT TO BE TRIED BY MILITARY COURTS:

a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.

b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.

c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.

M. PROVISIONS APPLICABLE TO ARREST AND DETENTION:

1. Right to liberty and security

(a) States shall ensure that the right of everyone on its territory and under its jurisdiction to liberty and security of person is respected.
(b) States must ensure that no one shall be subject to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose, pursuant to a warrant, on reasonable suspicion or for probable cause.

(c) Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.

(d) Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

(e) Unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial. However, release may be subject to certain conditions or guarantees, including the payment of bail.

(f) Expectant mothers and mothers of infants shall not be kept in custody pending their trial, but their release may be subject to certain conditions or guarantees, including the payment of bail.

(g) States shall ensure, including by the enactment of legal provisions, that officials or other persons who arbitrarily arrest or detain any person are brought to justice.

(h) States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of unlawful arrest or detention is enabled to claim compensation.

1. Rights upon arrest:

a) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her.

b) Anyone who is arrested or detained shall be informed upon arrest, in a language he or she understands, of the right to legal representation and to be examined by a doctor of his or her choice and the facilities available to exercise this right.

c) Anyone who is arrested or detained has the right to inform, or have the authorities notify, their family or friends. The information must include the fact of their arrest or detention and the place the person is kept in custody.

d) If the arrested or detained person is a foreign national, he or she must be promptly informed of the right to communicate with his or her embassy or consular post. In addition, if the person is a refugee or stateless person or under the protection of an inter-governmental organization, he or she must be notified without delay of the right to communicate with the appropriate international organization.

e) States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organization.

f) Any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present.

g) Anyone who is arrested or detained shall be given reasonable facilities to receive visits from family and friends, subject to restriction and supervision only as are necessary in the interests of the administration of justice and of security of the institution.

h) Any form of detention and all measures affecting the human rights of a person arrested or detained shall be subject to the effective control of a judicial or other authority. In order to prevent arbitrary arrest and detention or disappearances, states should establish procedures that require police or other officials with the authority to arrest and detain to inform the appropriate judicial official or other authority of the arrest and detention. The judicial official or other authority shall exercise control over the official detaining the person.

1. Right to be brought promptly before a judicial officer:

a) Anyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

b) The purpose of the review before a judicial or other authority includes to:

1. assess whether sufficient legal reason exists for the arrest;

2. assess whether detention before trial is necessary;

3. determine whether the detainee should be released from custody, and the conditions, if any, for such release;

4. safeguard the well-being of the detainee;

5. prevent violations of the detainee's fundamental rights;

6. give the detainee the opportunity to challenge the lawfulness of his or her detention and to secure release if the arrest or detention violates his or her rights.

1. Right of arrested or detained person to take proceedings before a judicial body:

Anyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings before a judicial body, in order that that judicial body may decide without delay on the lawfulness of his or her detention and order release if the detention is not lawful.

2. Right to habeas corpus:

a) States shall enact legislation, where it does not exist, to ensure the right to habeas corpus, amparo or similar procedures.

b) Anyone concerned or interested in the well-being, safety or security of a person deprived of his or her liberty has the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of such a person and/or identifying the authority ordering or carrying out the deprivation of liberty.

c) In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

d) Any other competent authority entitled under law of the State or by any international legal instrument to which the State is a party may also have access to such places.

e) Judicial bodies shall at all times hear and act upon petitions for habeas corpus, amparo or similar procedures. No circumstances whatever must be invoked as a justification for denying the right to habeas corpus, amparo or similar procedures.

1. Right to be detained in a place recognised by law:

a) Any person deprived of liberty shall be held in an officially recognised place of detention.

b) Accurate information shall be recorded regarding any person deprived of liberty including:

1. his or her identity;

2. the reasons for arrest;

3. the time of arrest and the taking of the arrested person to a place of custody;

4. the time of his first appearance before a judicial or other authority;

5. the identity of the law enforcement officials concerned;

6. precise information concerning the place of custody;

7. details of the judicial official or other authority informed of the arrest and detention.

a) Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be promptly available to their family members, their legal representative or to any other persons having a legitimate interest in the information.

b) An official up-to-date register of all persons deprived of liberty shall be maintained in every place of detention and shall be made available to any judicial or other competent and independent national authority seeking to trace the whereabouts of the a detained person.

7. Right to humane treatment:

(a) States shall ensure that all persons under any form of detention or imprisonment are treated in a humane manner and with respect for the inherent dignity of the human person.

(b) In particular States must ensure that no person, lawfully deprived of his or her liberty is subjected to torture or to cruel, inhuman or degrading treatment or punishment. States shall ensure that special measures are taken to protect women detainees from ill-treatment, including making certain that their interrogation is conducted by women police or judicial officials.

(c) Women shall at all times be detained separately from men and while in custody they shall receive care, protection and all necessary individual assistance – psychological, medical and physical – that they may require in view of their sex and gender.

(d) It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him or her to confess, to incriminate himself or herself or to testify against any other person.

(e) No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his or her capacity of decision or his or her judgement.

(f) No detained person shall, even with his or her consent, be subjected to any medical or scientific experimentation which could be detrimental to his or her health.

(g) A detained person or his or her legal representative or family shall have the right to lodge a complaint to the relevant authorities regarding his or her treatment, in particular in case of torture or other cruel, inhuman or degrading treatment.

(h) States shall ensure that effective mechanisms exist for the receipt and investigation of such complaints. The right to lodge complaints and the existence of such mechanisms should be promptly made known to all arrested or detained persons.

(i) States shall ensure, including by the enactment of legal provisions, that officials or other persons who subject arrested or detained persons to torture or to cruel, inhuman or degrading treatment are brought to justice.

(j) States shall ensure, including by the enactment of legal provisions and adoption of procedures, that anyone who has been the victim of torture or cruel, inhuman or degrading treatment or punishment is enabled to claim compensation.

8. Supervision of places of detention:

(a) In order to supervise strict observance of relevant laws and regulations and international standards applicable to detainees, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention.

(b) A detained person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with the above principle, subject to reasonable conditions to ensure security and good order in such places.

N. PROVISIONS APPLICABLE TO PROCEEDINGS RELATING TO CRIMINAL CHARGES:

1. Notification of charge:

(a) Any person charged with a criminal offence shall be informed promptly, as soon as a charge is first made by a competent authority, in detail, and in a language, which he or she understands, of the nature and cause of the charge against him or her.

(b) The information shall include details of the charge or applicable law and the alleged facts on which the charge is based sufficient to indicate the substance of the complaint against the accused.

(c) The accused must be informed in a manner that would allow him or her to prepare a defence and to take immediate steps to secure his or her release.

1. Right to counsel:

(a) The accused has the right to defend him or herself in person or through legal assistance of his or her own choosing. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms.

(b) The accused has the right to be informed, if he or she does not have legal assistance, of the right to defend him or herself through legal assistance of his or her own choosing.

(c) This right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.

(d) The accused has the right to choose his or her own counsel freely. This right begins when the accused is first detained or charged. A judicial body may not assign counsel for the accused if a qualified lawyer of the accused's own choosing is available.

1. Right to adequate time and facilities for the preparation of a defence:

(a) The accused has the right to communicate with counsel and have adequate time and facilities for the preparation of his or her defence.

(b) The accused may not be tried without his or her counsel being notified of the trial date and of the charges in time to allow adequate preparation of a defence.

(c) The accused has a right to adequate time for the preparation of a defence appropriate to the nature of the proceedings and the factual circumstances of the case. Factors which may affect the adequacy of time for preparation of a defence include the complexity of the case, the defendant's access to evidence, the length of time provided by rules of procedure prior to particular proceedings, and prejudice to the defence.

(d) The accused has a right to facilities which assist or may assist the accused in the preparation of his or her defence, including the right to communicate with defence counsel and the right to materials necessary to the preparation of a defence.

(e) All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate with a lawyer, without delay, interception or censorship and in full confidentiality.

1. The right to confer privately with one's lawyer and exchange confidential information or instructions is a fundamental part of the preparation of a defence. Adequate facilities shall be provided that preserve the confidentiality of communications with counsel.

2. States shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

3. The accused or the accused's defence counsel has a right to all relevant information held by the prosecution that could help the accused exonerate him or herself.

4. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

5. The accused has a right to consult legal materials reasonably necessary for the preparation of his or her defence.

6. Before judgement or sentence is rendered, the accused and his or her defence counsel shall have the right to know and challenge all the evidence which may be used to support the decision. All evidence submitted must be considered by the judicial body.

7. Following a trial and before any appellate proceeding, the accused or the defence counsel has a right of access to (or to consult) the evidence which the judicial body considered in making a decision and the judicial body’s reasoning in arriving at the judgement.

1. The right to an interpreter:

(a) The accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used before the judicial body.

(b) The right to an interpreter does not extend to the right to express oneself in the language of one's choice if the accused or the defence witness is sufficiently proficient in the language of the judicial body.

(c) The right to an interpreter applies at all stages of the proceedings, including pre-trial proceedings.

(d) The right to an interpreter applies to written as well as oral proceedings. The right extends to translation or interpretation of all documents or statements necessary for the defendant to understand the proceedings or assist in the preparation of a defence.

(e) The interpretation or translation provided shall be adequate to permit the accused to understand the proceedings and for the judicial body to understand the testimony of the accused or defence witnesses.

(f) The right to interpretation or translation cannot be qualified by a requirement that the accused pay for the costs of an interpreter or translator. Even if the accused is convicted, he or she cannot be required to pay for the costs of interpretation or translation.

1. Right to trial without undue delay:

(a) Every person charged with a criminal offence has the right to a trial without undue delay.

(b) The right to a trial without undue delay means the right to a trial which produces a final judgement and, if appropriate a sentence without undue delay.

(c) Factors relevant to what constitutes undue delay include the complexity of the case, the conduct of the parties, the conduct of other relevant authorities, whether an accused is detained pending proceedings, and the interest of the person at stake in the proceedings.

1. Rights during a trial:

(a) In criminal proceedings, the principle of equality of arms imposes procedural equality between the accused and the public prosecutor.
1. The prosecution and defence shall be allowed equal time to present evidence.
2. Prosecution and defence witnesses shall be given equal treatment in all procedural matters.
(a) The accused is entitled to a hearing in which his or her individual culpability is determined. Group trials in which many persons are involved may violate the person's right to a fair hearing.
(b) In criminal proceedings, the accused has the right to be tried in his or her presence.
1. The accused has the right to appear in person before the judicial body.
2. The accused may not be tried in absentia. If an accused is tried in absentia, the accused shall have the right to petition for a reopening of the proceedings upon a showing that inadequate notice was given, that the notice was not personally served on the accused, or that his or her failure to appear was for exigent reasons beyond his or her control. If the petition is granted, the accused is entitled to a fresh determination of the merits of the charge.
3. The accused may voluntarily waive the right to appear at a hearing, but such a waiver shall be established in an unequivocal manner and preferably in writing.
(a) The accused has the right not to be compelled to testify against him or herself or to confess guilt.
1. Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession or admission obtained during incommunicado detention shall be considered to have been obtained by coercion.
2. Silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from the exercise of the right to remain silent.
(a) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
1. The presumption of innocence places the burden of proof during trial in any criminal case on the prosecution.
2. Public officials shall maintain a presumption of innocence. Public officials, including prosecutors, may inform the public about criminal investigations or charges, but shall not express a view as to the guilt of any suspect.
3. Legal presumptions of fact or law are permissible in a criminal case only if they are rebuttable, allowing a defendant to prove his or her innocence.

(a) The accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.
1. The prosecution shall provide the defence with the names of the witnesses it intends to call at trial within a reasonable time prior to trial which allows the defendant sufficient time to prepare his or her defence.
2. The accused's right to examine witnesses may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth.
3. The accused has the right to be present during the testimony of a witness. This right may be limited only in exceptional circumstances such as when a witness reasonably fears reprisal by the defendant, when the accused engages in a course of conduct seriously disruptive of the proceedings, or when the accused repeatedly fails to appear for trivial reasons and after having been duly notified.
4. If the defendant is excluded or if the presence of the defendant cannot be ensured, the defendant's counsel shall always have the right to be present to preserve the defendant's right to examine the witness.
5. If national law does not permit the accused to examine witnesses during pre-trial investigations, the defendant shall have the opportunity, personally or through defence counsel, to cross-examine the witness at trial. However, the right of a defendant to cross-examine witnesses personally may be limited in respect of victims of sexual violence and child witnesses, taking into consideration the defendant’s right to a fair trial.
6. The testimony of anonymous witnesses during a trial will be allowed only in exceptional circumstances, taking into consideration the nature and the circumstances of the offence and the protection of the security of the witness and if it is determined to be in the interests of justice.
(a) Evidence obtained by illegal means constituting a serious violation of internationally protected human rights shall not be used as evidence against the accused or against any other person in any proceeding, except in the prosecution of the perpetrators of the violations.

1. Right to benefit from a lighter sentence or administrative sanction
(a) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit therefromby.
(b) A lighter penalty created any time before an accused's sentence has been fully served should be applied to any offender serving a sentence under the previous penalty.
(c) Administrative tribunals conducting disciplinary proceedings shall not impose a heavier penalty than the one that was applicable at the time when the offending conduct occurred. If, subsequent to the conduct, provision is made by law for the imposition of a lighter penalty, the person disciplined shall benefit thereby.

1. Second trial for same offence prohibited

No one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

2. Sentencing and punishment

(a) Punishments constituting a deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.
(b) In countries that have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.
(c) Sentence of death shall not be imposed or carried out on expectant mothers and mothers of infants and young children.
(d) States that maintain the death penalty are urged to establish a moratorium on executions, and to reflect on the possibility of abolishing capital punishment.
(e) States shall provide special treatment to expectant mothers and to mothers of infants and young children who have been found guilty of infringing the penal law and shall in particular:

1. ensure that a non-custodial sentence will always be first considered when sentencing such mothers;

2. establish and promote measures alternative to institutional confinement for the treatment of such mothers;

3. establish special alternative institutions for holding such mothers;

4. ensure that a mother shall not be imprisoned with her child;

5. the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

10. Appeal

(a) Everyone convicted in a criminal proceeding shall have the right to review of his or her conviction and sentence by a higher tribunal.
1. The right to appeal shall provide a genuine and timely review of the case, including the facts and the law. If exculpatory evidence is discovered after a person is tried and convicted, the right to appeal or some other post-conviction procedure shall permit the possibility of correcting the verdict if the new evidence would have been likely to change the verdict, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to the accused.
2. A judicial body shall stay execution of any sentence while the case is on appeal to a higher tribunal.
(a) Anyone sentenced to death shall have the right to appeal to a judicial body of higher jurisdiction, and States should take steps to ensure that such appeals become mandatory.
(b) When a person has by a final decision been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that

there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law.
(c) Every person convicted of a crime has a right to seek pardon or commutation of sentence. Clemency, commutation of sentence, amnesty or pardon may be granted in all cases of capital punishment.

N. CHILDREN AND THE RIGHT TO A FAIR TRIAL

(a) In accordance with the African Charter on the Rights and Welfare of the Child, a child is any person under the age of 18. States must ensure that domestic legislation recognises any person under the age of 18 as a child.

(b) Children are entitled to all the fair trial guarantees applicable to adults and to some additional special protection.

(c) States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with children who interact with the criminal justice system whether as suspects, accused, complainants or witnesses.

(d) States shall establish laws and procedures which set a minimum age below which children will be presumed not to have the capacity to infringe the criminal law. The age of criminal responsibility should not be fixed below 15 years of age. No child below the age of 15 shall be arrested or detained on allegations of having committed a crime.

(e) No child shall be subjected to arbitrary arrest or detention.

(f) Law enforcement officials must ensure that all contacts with children are conducted in a manner that respects their legal status, avoids harm and promotes the well-being of the child.

(g) When a child suspected of having infringed the penal law is arrested or apprehended, his or her parent, guardians or family relatives should be notified immediately.

(h) The child's right to privacy shall be respected at all times in order to avoid harm being caused to him or her by undue publicity and no information that could identify a child suspected or accused of having committed a criminal offence shall be published.

(i) States shall consider, wherever appropriate, with the consent of the child and his or parents or guardians, dealing with a child offender without resorting to a formal trial, provided the rights of the child and legal safeguards are fully respected. Alternatives to criminal prosecution, with proper safeguards for the protection of the well-being of the child, may include:

1. The use of community, customary or traditional mediation;

2. Issuing of warnings, cautions and admonitions accompanied by measures to help the child at home with education and with problems and difficulties.

3. Arranging a conference between the child, the victim and members of the community;

4. Making use of community programmes such as temporary supervision and guidance, restitution and compensation to victims.

(a) Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. Any child who has been arrested for having committed a crime shall be released into the care of his or her parents, legal guardians or family relatives unless there are exceptional reasons for his or her detention. The competent authorities shall ensure that children are not held in detention for any period beyond 48 hours.

(b) Children who are detained pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

(c) Every child arrested or detained for having committed a criminal offence shall have the following guarantees:

1. to be treated in a manner consistent with the promotion of the child's dignity and worth;

2. to have the assistance of his or her parents, a family relative or legal guardians from the moment of arrest;

3. to be provided by the State with legal assistance from the moment of arrest;

4. to be informed promptly and directly, in a language he or she understands, of the reasons for his or her arrest and of any charges against his or her, and if appropriate, through his or her parents, other family relative, legal guardians or legal representative;

5. to be informed of his or her rights in a language he or she understands;

6. not to be questioned without the presence of his or her parents, a family relative or legal guardians, and a legal representative;

7. not to be subjected to torture or any other cruel, inhuman or degrading treatment or punishment or any duress or undue pressure;

8. not to be detained in a cell or with adults detainees.

(a) States shall establish separate or specialized procedures and institutions for dealing with cases in which children are accused of or found responsible for having committed criminal offences. The establishment of such procedures and institutions shall be based on respect for the rights of the child, shall take into account the vulnerability of children and shall promote the child's rehabilitation.

(b) Every child accused of having committed a criminal offence shall have the following additional guarantees:

1. to be presumed innocent until proven guilty according to the law;

2. to be informed promptly and directly, and in a language that he or she understands, of the charges, and if appropriate, through his or her parents or legal guardians;

3. to be provided by the State with legal or other appropriate assistance in the preparation and presentation of his or her defence;

4. to have the case determined expeditiously by a competent, independent and impartial authority or judicial body established by law in a fair hearing;

5. to have the assistance of a legal representative and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardians, during the proceedings;

6. not to be compelled to give testimony or confess guilt; to examine or have examine adverse witnesses and to obtain the participation of witnesses on his or her behalf under conditions of equality;

7. if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

8. to have the free assistance of an interpreter if he or she cannot understand or speak the language used;

9. to have his or her privacy fully respected at all stages of the proceedings.

(a) In disposing of a case involving a child who has been found to be in conflict with the law, the competent authority shall be guided by the following principles:

1. The action taken against the child shall always be in proportion not only to the circumstances and gravity of the offence but also the best interest of the child and the interests of society;

2. Non-custodial options which emphasise the value of restorative justice should be given primary consideration and restrictions on the personal liberty of a child shall only be imposed after careful consideration and shall be limited to the possible minimum. Non-custodial measures could include:

a) Care, guidance and supervision orders;

ii) Probation;

iii) Financial penalties, compensation and restitution;

iv) Intermediate treatment and other treatment orders

v) Orders to participate in group counselling and similar activities;

vi) Orders concerning foster care, living communities or other educational settings

1. A child shall not be sentenced to imprisonment unless the child is adjudicated of having committed a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;

2. Capital punishment shall not be imposed for any crime committed by children and children shall not be subjected to corporal punishment.

(a) States shall ensure that child witnesses are able to give their best evidence with the minimum distress. Investigation and practices of judicial bodies should be adapted to afford greater protection to children without undermining the defendant's right to a fair trial. States are required, as appropriate, to adopt the following measures in regard to child witnesses:

1. Child witnesses shall not be questioned by the police or any investigating official without the presence of his or her parents, a family relative or legal guardians, or where the latter are not traceable in the presence of a social worker;

2. Police and investigating officials shall conduct their questioning of child witnesses in a manner that avoids any harm and promotes the well-being of the child;

3. Police and investigating officials shall ensure that child witnesses, especially those who are victims of sexual abuse, do not come into contact with or made to confront the alleged perpetrator of the crime;

4. The child's right to privacy shall be respected at all times and no information that could identify a child witness shall be published;

5. Where necessary, a child witness shall be questioned by law enforcement officials through an intermediary;

6. A child witness should be permitted to testify before a judicial body through an intermediary, if necessary;

7. Where resources and facilities permit, video-recorded pre-trial interviews with child witnesses should be presented;

8. Screens should be set up around the witness box to shield the child witness from viewing the defendant;

9. The public gallery should be cleared, especially in sexual offence cases and cases involving intimidation, to enable evidence to be given in private;

10. Judicial officers, prosecutors and lawyers should wear ordinary dress during the testimony of a child witness;

11. Defendants should be prevented from personally cross-examination child witnesses;

12. The circumstances in which information about the previous sexual history of alleged child victims may be sought or presented as evidence in trials for sexual offences must be restricted.

N. VICTIMS OF CRIME AND ABUSE OF POWER

a) Victims should be treated with compassion and respect for their dignity. They are entitled to have access to the mechanisms of justice and to prompt redress, as provided for by national legislation and international law, for the harm that they have suffered.

b) States must ensure that women who are victims of crime, especially of a sexual nature, are interviewed by women police or judicial officials.

c) Sates shall take steps to ensure that women who are complainants, victims or witnesses are not subjected to any cruel, inhumane or degrading treatment.

d) Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

e) States are required to investigate and punish all complaints of violence against women, including domestic violence, whether those acts are perpetrated by the state, its officials or agents or by private persons. Fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence.

f) Judicial officers, prosecutors and lawyers, as appropriate, should facilitate the needs of victims by:

1. Informing them of their role and the scope, timing and progress of the proceedings and the final outcome of their cases;

2. Allowing their views and concerns to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

3. Providing them with proper assistance throughout the legal process;

4. Taking measures to minimize inconvenience to them, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

5. Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

a) Informal mechanisms for the resolution of disputes, including mediation, arbitration and traditional or customary practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

b) Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses, the provision of services and the restoration of rights.

c) States should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

d) Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws or international law, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted.

e) When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

1. Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

2. The family, in particular dependants of persons who have died or become physically or mentally incapacitated.

a) States are encouraged to establish, strengthen and expand national funds for compensation to victims.

b) States must ensure that :

1. Victims receive the necessary material, medical, psychological and social assistance through state, voluntary, non-governmental and community-based means.

2. Victims are informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.

3. Police, justice, health, social service and other personnel concerned receive training to sensitize them to the needs of victims, and guidelines are adopted to ensure proper and prompt aid.

Q. TRADITIONAL COURTS

a) Traditional courts, where they exist, are required to respect international standards on the right to a fair trial.

b) The following provisions shall apply, as a minimum, to all proceedings before traditional courts:

1. equality of persons without any distinction whatsoever as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, means, disability, birth, status or other circumstances;

2. respect for the inherent dignity of human persons, including the right not to be subject to torture, or other cruel, inhuman or degrading punishment or treatment;

3. respect for the right to liberty and security of every person, in particular the right of every individual not to be subject to arbitrary arrest or detention;

4. respect for the equality of women and men in all proceedings;

5. respect for the inherent dignity of women, and their right not to be subjected to cruel, inhuman or degrading treatment or punishment;

6. adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

7. an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the traditional court;

8. an entitlement to seek the assistance of and be represented by a representative of the party's choosing in all proceedings before the traditional court;

9. an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the traditional court;

10. an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions;

11. an entitlement to an appeal to a higher traditional court, administrative authority or a judicial tribunal;

12. all hearings before traditional courts shall be held in public and its decisions shall be rendered in public, except where the interests of children require or where the proceedings concern matrimonial disputes or the guardianship of children;

a) The independence of traditional courts shall be guaranteed by the laws of the country and respected by the government, its agencies and authorities:

1. they shall be independent from the executive branch;

i 2. there shall not be any inappropriate or unwarranted interference with proceedings before traditional courts.

a) States shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without any restrictions, improper

influence, inducements, pressure, threats or interference, direct or indirect, from any quarter.

1. The impartiality of a traditional court would be undermined when one of its members has:

1.1 expressed an opinion which would influence the decision-making;

1.2 some connection or involvement with the case or a party to the case;

1.3 a pecuniary or other interest linked to the outcome of the case.

2. Any party to proceedings before a traditional court shall be entitled to challenge its impartiality on the basis of ascertainable facts that the fairness any of its members or the traditional court appears to be in doubt.

a) The procedures for complaints against and discipline of members of traditional courts shall be prescribed by law. Complaints against members of traditional courts shall be processed promptly and expeditiously, and with all the guarantees of a fair hearing, including the right to be represented by a legal representative of choice and to an independent review of decisions of disciplinary, suspension or removal proceedings.

R. NON-DEGORABILITY CLAUSE

No circumstances whatsoever, whether a threat of war, a state of international or internal armed conflict, internal political instability or any other public emergency, may be invoked to justify derogations from the right to a fair trial.

S. USE OF TERMS

For the purpose of these Principles and Guidelines:

a) “Arrest” means the act of apprehending a person for the alleged commission of an offence or by the action of an authority.

b) “Criminal charge” is defined by the nature of the offence and the nature and degree of severity of the penalty incurred. An accusation may constitute a criminal charge although the offence is not classified as criminal under national law.

c) “Detained person” or “detainee” means any individual deprived of personal liberty except as a result of conviction for an offence.

d) “Detention” means the condition of a detained person.

e) “Imprisoned person” or “prisoner” means any individual deprived of personal liberty as a result of conviction for an offence.

f) “Imprisonment” means the condition of imprisoned persons.

g) “Suspect” means a person who has been arrested but not arraigned or charged before a judicial body.

h) “Judicial body” means a dispute resolution or adjudication mechanism established and regulated by law and includes courts and other tribunals.

i) “Judicial office” means a position on a judicial body.

j) “Judicial officer” means a person who sits in adjudication as part of a judicial body.

k) “Legal proceeding” means any proceeding before a judicial body brought in regard to a criminal charge or for the determination of rights or obligations of any person, natural or legal.

l) “Traditional court” means a body which, in a particular locality, is recognised as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition.

m) “Habeas corpus”, “amparo” is a legal procedure brought before a judicial body to compel the detaining authorities to provide accurate and detailed information regarding the whereabouts and conditions of detention of a person or to produce a detainee before the judicial body.

n) “Victim” means persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws or that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights. The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress.

APPENDIX C

Draft Principles Governing the Administration of Justice Through Military Tribunals, U.N. Doc. E/CN.4/2006/58 at 4 (2006).

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CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY
Issue of the administration of justice through military tribunals
Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux

Summary
At its sixty-first session, the Commission on Human Rights referred to the continuing study on the issue of the administration of justice through military tribunals in two mutually complementary resolutions, 2005/30, "Integrity of the judicial system", and 2005/33, "Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", both adopted on 19 April 2005. The latter, adopted without a vote, took note of "the report submitted by Mr. Emmanuel Decaux to the Sub-Commission on the Promotion and Protection of Human Rights on the administration of justice through military tribunals (E/CN.4/Sub.2/2004/7), which includes draft principles governing the administration of justice through military tribunals" (para. 11), and noted "that the report of Mr. Decaux containing an updated version of the draft principles [would] be submitted to the Commission at its sixty-second session for its consideration" (para. 12).

The Commission thus established both the conceptual framework and the schedule for the study, specifying that the updated version should be transmitted to it in 2006.

The submission of the updated version will mark the end of an undertaking in which the Sub-Commission has been engaged for several years, beginning with the questionnaire drawn up by Mr. Louis Joinet for his report to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3, annex), followed by his report to the fifty-fourth session (E/CN.4/Sub.2/2002/4), and the reports by Mr. Emmanuel Decaux to the fifty-fifth session (E/CN.4/Sub.2/2003/4), the fifty-sixth session (E/CN.4/Sub.2/2004/7) and the fifty-seventh session (E/CN.4/Sub.2/2005/9).

At its fifty-seventh session, the Sub-Commission, after an in-depth discussion, welcomed the report submitted by Mr. Decaux (E/CN.4/Sub.2/2005/9) and on 10 August 2005 adopted, without a vote, resolution 2005/15 in which it decided "to transmit the updated draft principles to the Commission on Human Rights for its consideration, together with the comments of the Sub-Commission during the present session" (para. 4). To that end, the Sub-Commission requested Mr. Decaux to revise the draft principles, taking into account the comments and observations of the Sub-Commission, in order to facilitate the examination by the Commission of the draft principles (para. 5). It is this document that is hereby submitted to the Commission.

The philosophy that inspires this study was recalled by the Commission in the resolutions mentioned above, in particular in the Commission's emphasis that "the integrity of the judicial system should be observed at all times" (resolutions 2004/32 and 2005/30). Hence it is important to situate the development of "military justice" within the framework of the general principles for the proper administration of justice. The provisions concerning the proper administration of justice have a general scope. In other words, military justice must be "an integral part of the general judicial system", to use the Commission's recurrent expression.

At the same time, what follows is a minimum system of universally applicable rules, leaving scope for stricter standards to be defined under domestic law. Although the Commission itself refers to "special criminal tribunals" this report deals only with the issue of military tribunals, leaving the other, nonetheless vital, issue - and the yet broader question of special courts - for a later study.

This approach has led to the development of "principles governing the administration of justice through military tribunals" as called for in Sub-Commission resolution 2003/8, principles based on the recommendations contained in Mr. Joinet's last report (E/CN.4/Sub.2/2002/4, para. 29 ff.). They have been added to, extended and revised in successive reports, and are presented here in their latest version, comprising 20 principles.

This consolidated version is thus intended as a response to the Commission's resolution in the form of a set of "draft principles governing the administration of justice through military tribunals".

Introduction

1. At its sixty-first session, the Commission on Human Rights referred to the continuing study on the issue of the administration of justice through military tribunals in two mutually complementary resolutions, 2005/30 and 2005/33, both adopted on 19 April 2005.

2. In resolution 2005/30, "Integrity of the judicial system", adopted by a recorded vote of 52 votes to none, with 1 abstention - the United States of America, which had requested the vote - the Commission, noting resolution 2004/27 of 12 August 2004, of

the Sub-Commission on the Promotion and Protection of Human Rights, took note of "the report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights on the issue of the administration of justice through military tribunals (E/CN.4/Sub.2/2004/7)" (para. 1) and requested "the Special Rapporteur of the Sub-Commission on the issue of the administration of justice through military tribunals to continue to take account of the present resolution in his ongoing work" (para. 10).

3. This resolution contains highly important provisions relating to earlier Commission resolutions on the same subject, notably resolution 2004/32 of 19 April 2004. In it, the Commission reaffirms that "according to paragraph 5 of the Basic Principles on the Independence of the Judiciary, everyone has the right to be tried by ordinary courts or tribunals using established legal procedures and that tribunals that do not use such duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals" (para. 3). It "calls upon States that have military courts or special criminal tribunals for trying criminal offenders to ensure that such courts are an integral part of the general judicial system and that such courts apply due process procedures that are recognized according to international law as guarantees of a fair trial, including the right to appeal a conviction and a sentence" (para. 8).

4. The second reference to the study appears in resolution 2005/33, "Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers", which was adopted without a vote. This is still more specific, taking note "of the report submitted by Mr. Emmanuel Decaux to the Sub-Commission on the Promotion and Protection of Human Rights on the administration of justice through military tribunals (E/CN.4/Sub.2/2004/7), which includes draft principles governing the administration of justice through military tribunals" (para. 11) and noting "that the report of Mr. Decaux containing an updated version of the draft principles will be submitted to [it] at its sixty-second session for its consideration" (para. 12).

5. The Commission thus established both the conceptual framework and the schedule for the study, specifying that the updated version should be transmitted to it in 2006. The submission of the updated version will mark the end of an undertaking in which the Sub-Commission has been engaged for several years, beginning with the questionnaire drawn up by Mr. Louis Joinet for his report to the Sub-Commission at its fifty-third session (E/CN.4/Sub.2/2001/WG.1/CRP.3, annex), followed by his report to the fifty-fourth session (E/CN.4/Sub.2/2002/4), and the reports by Mr. Emmanuel Decaux to the fifty-fifth session (E/CN.4/Sub.2/2003/4), fifty-sixth session (E/CN.4/Sub.2/2004/7) and fifty-seventh session (E/CN.4/Sub.2/2005/9). Following its decision 2002/103 of 12 August 2002, the Sub-Commission itself discussed the issue in depth, notably at its two most recent sessions, adopting resolutions 2003/8, 2004/27 and 2005/15, in each case without a vote.

6. At its fifty-seventh session, the Sub-Commission, after an in-depth discussion, welcomed the report submitted by Mr. Decaux (E/CN.4/Sub.2/2005/9) and on 10 August 2005 adopted,
without a vote, resolution 2005/15 in which it decided "to transmit the updated draft principles to the Commission on Human Rights for its consideration, together with the comments of the

Sub-Commission during the present session" (para. 4). To that end, the Sub-Commission requested Mr. Decaux to revise the draft principles, taking into account the comments and
observations of the Sub-Commission, in order to facilitate the examination by the Commission of the draft principles (para. 5). It is this document that is hereby submitted to the Commission,
together with the comments and observations of the members of the Sub-Commission mentioned below.

7. The interactive dialogue held on 28 July 2005 following the introduction of the report was constructive and lively. A number of members (Ms. Hampson, Mr. Salama, Mr. Rivkin, Ms. Motoc, Ms. Koufa, Ms. Sardenberg, Mr. Cherif, Mr. Alfredsson and Mr. Yokota) and several non-governmental organizations (NGOs) took an active part in the discussion. Ms. Hampson stressed the need to include in the set of principles one dealing specifically with the application of martial law in exceptional circumstances, allowing civilians to be tried under military law, which is preferable to no justice at all. Recourse to martial law should continue to be quite exceptional, provide guarantees of a fair trial and preclude the imposition of the death penalty. Mr. Rivkin was of the opinion that military justice could be equal, or even superior, to civilian justice, insofar as it is administered by competent individuals who have seen or been trained in combat and have a better understanding of what happens in wartime. He also defended the setting up of ad hoc courts alongside the ordinary courts. Lastly, he said he did not agree with Ms. Hampson's suggestion regarding non-application of the death penalty to civilians, since in his view death could be an appropriate punishment. Ms. Hampson emphasized that the issue was not capital punishment but a fair trial. She recalled numerous cases showing that insufficient guarantees of a fair trial were provided by military tribunals.

8. Many members of the Sub-Commission congratulated Mr. Decaux on his report: Ms. Koufa described it as an excellent and exemplary piece of work which set a new standard for the Sub-Commission. Ms. Motoc said she found the principles extremely useful but wondered about their application in failed States where the ordinary courts had ceased to function. In the Democratic Republic of the Congo, justice reform had begun with a reform of military justice. Mr. Yokota said that, based on his experience as Special Rapporteur on the situation of human rights in Myanmar, he considered that military tribunals did not offer a fair system of justice. He wondered whether human rights violations committed by soldiers should fall within the jurisdiction of military courts. Mr. Alfredsson pointed out that military tribunals must comply with the rules of international human rights law not only in respect of civilians but also in respect of military operations. Lastly, Mr. Salama said he shared Mr. Decaux's view that it was better to civilize military tribunals than to demonize them.

9. The Special Rapporteur has also taken account of recent developments and newly available information on the subject. In this regard, the seminar organized by the International Commission of Jurists (ICJ) in Geneva from 26 to 28 January 2004, entitled "Human rights and the administration of justice through military tribunals", was particularly useful; it brought together experts, lawyers and military personnel from all legal systems and from all parts of the world, as well as representatives of diplomatic missions and NGOs based in Geneva. This should be followed up by another ICJ seminar early in 2006 to discuss the revised principles set out in this

report, as requested by the Sub-Commission, which, in its resolution 2005/15, expressed the wish that "under the auspices of the Office of the United Nations High Commissioner for Human Rights, a second seminar of military and other experts on the issue of the administration of justice through military tribunals be organized and [encouraged] other such initiatives" (para. 6). In that regard, the Special Rapporteur would hope that the draft principles will continue to be the subject of frank and open discussions with all concerned individuals and institutions.

10. The philosophy that inspires this study was recalled by the Commission in the resolutions mentioned above, in particular in the Commission's emphasis that "the integrity of the judicial
system should be observed at all times" (resolutions 2004/32 and 2005/30). Hence it is important to situate the development of "military justice" within the framework of the general principles for the proper administration of justice. The principles contained in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as in regional conventions or other relevant instruments, are unambiguous with regard to justice. The provisions concerning the proper administration of justice have a general scope. In other words, military justice must be "an integral part of the general judicial system", to use the Commission's recurrent expression. At the same time, what follows is a minimum system of universally applicable rules, leaving scope for stricter standards to be defined under domestic law. Although the Commission itself refers to "special criminal tribunals" this report deals only with the issue of military tribunals, leaving the other, nonetheless vital, issue - and the yet broader question of special courts - for a later study.

11. The approach selected for this study on the administration of justice through military tribunals implies the rejection of two extreme positions, both of which tend to make military justice a separate - expedient and expeditious - form of justice, outside the scope of ordinary law, whether military justice is "sanctified" and placed above the basic principles of the rule of law, or "demonized" on the basis of the historical experiences of an all too recent past on many continents. The alternative is simple: either military justice conforms to the principles of the proper administration of justice and becomes a form of justice like any other, or it constitutes "exceptional justice", a separate system without checks or balances, which opens the door to all kinds of abuse and is "justice" in name only ... Between the extremes of sanctification and demonization lies the path of normalization - the process of "civilizing" military justice - which underlies the current process.

12. This approach has led to the development of "principles governing the administration of justice through military tribunals" as called for in Sub-Commission resolution 2003/8, principles
based on the recommendations contained in Mr. Joinet's last report (E/CN.4/Sub.2/2002/4, para. 29 ff.). They have been added to, extended and revised in successive reports, growing in number from 13 to 17, then 19, and are presented here in their latest version, comprising 20 principles. The explanatory commentary has been trimmed so as not to repeat material appearing in earlier reports such as E/CN.4/Sub.2/2004/7 and E/CN.4/Sub.2/2005/9. This consolidated version is thus intended as a response to the Commission, which noted that "the report of Mr. Decaux containing an updated version of the draft principles [would] be submitted to the

Commission at its sixty-second session for its consideration" (resolution 2005/33).

DRAFT PRINCIPLES GOVERNING THE ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS

Principle No. 1

Establishment of military tribunals by the constitution or the law

Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.

13. The Basic Principles on the Independence of the Judiciary, adopted by the General Assembly in 1985, stipulate that "the independence of the judiciary shall be guaranteed by the State and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary" (para. 1). The principle of the separation of powers goes together with the requirement of statutory guarantees provided at the highest level of the hierarchy of norms, by the constitution or by the law, avoiding any interference by the executive or the military in the administration of justice.

14. The doctrinal issue of the legitimacy of military courts will not be decided here, as indicated in previous reports (E/CN.4/Sub.2/2003/4, para. 71, E/CN.4/Sub.2/2004/7, para. 11 and E/CN.4/Sub.2/2005/9, para. 11), pursuant to the report of Mr. Joinet (E/CN.4/Sub.2/2002/4, para. 29). The matter at hand is the legality of military justice. In this regard, the "constitutionalization" of military tribunals that exists in a number of countries should not place them outside the scope of ordinary law or above the law but, on the contrary, should include them in the principles of the rule of law, beginning with those concerning the separation of powers and the hierarchy of norms. In this regard, this first principle is inseparable from all the principles that follow. Emphasis must be placed on the unity of justice. As Mr. Stanislav Chernenko and Mr. William Treat state in their final report to the Sub-Commission on the right to a fair trial, submitted in 1994, "tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals" and "a court shall be independent from the executive branch. The executive branch in a State shall not be able to interfere in a court's proceedings and a court shall not act as an agent for the executive against an individual citizen".1

Principle No. 2

Respect for the standards of international law

Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.

15. Military tribunals, when they exist, must in all circumstances respect the

principles of international law relating to a fair trial. This is a matter of minimum guarantees; even in times of crisis, particularly as regards the provisions of article 4 of the International Covenant on Civil and Political Rights, State parties' derogations from ordinary law should not be "inconsistent with their other obligations under international law" nor involve "discrimination solely on the ground of race, colour, sex, language, religion or social origin". If article 14 of the Covenant does not explicitly figure in the "hard core" of non-derogable rights, the existence of effective judicial guarantees constitutes an intrinsic element of respect for the principles contained in the Covenant, and particularly the provisions of article 4, as the Human Rights Committee emphasizes in its general comment No. 29.2 Without such basic guarantees, we would be faced with a denial of justice, pure and simple. These guarantees are made explicit in the principles below.

Principle No. 3

Application of martial law

In times of crisis, recourse to martial law or special regimes should not compromise the guarantees of a fair trial. Any derogations "strictly required by the exigencies of the situation" should be consistent with the principles of the proper administration of justice. In particular, military tribunals should not be substituted for ordinary courts, in derogation from ordinary law.

16. This new principle was introduced pursuant to the fifty-seventh session of the Sub-Commission, at the suggestion of Ms. Françoise Hampson. Its purpose is to take account of situations of internal crisis arising in the aftermath of a natural disaster or a "public emergency" within the meaning of article 4 of the International Covenant on Civil and Political Rights, when martial law or similar exceptional regimes, such as a state of siege or emergency, are declared. This is a grey area, in which serious derogations may be made from the normal guarantees associated with the rule of law yet the safeguards provided under international humanitarian law do not necessarily apply. As the Human Rights Committee has emphasized in general comment No. 29, referred to above, "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency" (para. 16). Any derogations "strictly required by the exigencies of the situation" should be consistent with the principles of the proper administration of justice. Consequently, all the principles relating to the administration of justice by military tribunals should continue to apply in full. In particular, military tribunals should not be substituted for ordinary courts, in derogation from ordinary law, by being given jurisdiction to try civilians.

Principle No. 4

Application of humanitarian law

In time of armed conflict, the principles of humanitarian law, and in particular the provisions of the Geneva Convention relative to the Treatment of Prisoners of War,

are fully applicable to military courts.

17. International humanitarian law also establishes minimum guarantees in judicial matters. Article 75, paragraph 4, of Protocol I to the Geneva Conventions of 12 August 1949 provides the
fundamental guarantees in judicial matters that must be respected even during international conflicts, referring to an "impartial and regularly constituted court", which, as the International
Committee of the Red Cross (ICRC) has stated, "emphasizes the need for administering justice as impartially as possible, even in the extreme circumstances of armed conflict, when the value
of human life is sometimes small".3 Article 6, paragraph 2, of Protocol II refers to a "court offering the essential guarantees of independence and impartiality". According to ICRC, "this sentence reaffirms the principle that anyone accused of having committed an offence related to the conflict is entitled to a fair trial. This right can only be effective if the judgement is given by 'a court offering the essential guarantees of independence and impartiality'".4 If respect for these judicial guarantees is compulsory during armed conflicts, it is not clear how such guarantees could not be absolutely respected in the absence of armed conflict. The protection of rights in peacetime should be greater than, if not equal to, that recognized in wartime.

18. Article 84 of the Geneva Convention relative to the Treatment of Prisoners of War reads:
"A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war. In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and, in particular, the procedure of which does not afford the accused the rights and means of defence provided for in article 105." All the provisions of the Convention are designed to guarantee strict equality of treatment "by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power" (art. 102). Should any doubt arise as to whether "persons having committed a belligerent act and having fallen into the hands of the enemy" are prisoners of war, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal" (art. 5).

19. Moreover, under the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, in situations of military occupation, "in case of a breach of the
penal provisions promulgated by it by virtue of the second paragraph of article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country (art. 66). The Convention stipulates that "the court shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence" (art. 67). The reference to "general principles of law", even in the application of lex specialis, is

worthy of particular note.5

Principle No. 5

Jurisdiction of military courts to try civilians

Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.

20. In paragraph 4 of its general comment No. 13 on article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee noted "the existence, in many countries, of military or special tribunals which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14".

21. The Human Rights Committee's practice over the past 20 years, particularly in its views concerning individual communications or its concluding observations on national reports, has only increased its vigilance, in order to ensure that the jurisdiction of military tribunals is restricted to offences of a strictly military nature committed by military personnel. Many thematic or country rapporteurs have also taken a very strong position in favour of military tribunals' lack of authority to try civilians. Similarly, the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights is unanimous on this point.6 As the Basic Principles on the Independence of the Judiciary put it, "everyone has the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that
do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals" (para. 5).

Principle No. 6

Conscientious objection to military service

Conscientious objector status should be determined under the supervision of an independent and impartial civil court, providing all the guarantees of a fair trial, irrespective of the stage of military life at which it is invoked.

22. As the Commission on Human Rights stated in its resolution 1998/77, it is incumbent on States to establish independent and impartial decision-making bodies with the task of determining whether a conscientious objection is genuinely held. By definition, in such cases military tribunals would be judges in their own cause. Conscientious objectors are civilians who should be tried in civil courts, under the

supervision of ordinary judges.

23. When the right to conscientious objection is not recognized by the law, the conscientious objector is treated as a deserter and the military criminal code is applied to him or her. The United Nations has recognized the existence of conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as laid down in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.7 The Human Rights Committee has very clearly linked conscientious objection to the principle of freedom of conscience enshrined in article 18 of the Covenant.8 It has expressed its concern on several occasions recently at the fact that military courts have punished conscientious objectors for failing to perform military service.9 It considers that a person may invoke the right to conscientious objection not only before entering military service or joining the armed forces but also once he or she is in the service or even afterwards.10

24. When the application for conscientious objector status is lodged before entry into military service, there should be no bar to the jurisdiction of an independent body under the control of a
civilian judge under the ordinary law. The matter may appear more complicated when the application is lodged in the course of military service, when the objector is already in uniform and subject to military justice. Yet such an application should not be punished ipso facto as an act of insubordination or desertion, independently of any consideration of its substance, but should be examined in accordance with the same procedure by an independent body that offers all the guarantees of a fair trial.

25. In resolution 2004/35 on conscientious objection to military service, adopted without a vote on 19 April 2004, the Commission, "recalling all its previous resolutions on the subject, in
particular resolution 1998/77 of 22 April 1998, in which the Commission recognized the right of everyone to have conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion, as laid down in article 18 of the Universal Declaration of Human Rights and article 18 of the International Covenant on Civil and Political Rights and general comment No. 22 (1993) of the Human Rights Committee", took note of "the compilation and analysis of best practices" in the report of the Office of the United Nations High Commissioner for Human Rights (E/CN.4/2004/55) and called "upon States that have not yet done so to review their current laws and practices in relation to conscientious objection to military service in the light of its resolution 1998/77, taking account of the information contained in the report" (para. 3). It also encouraged States, "as part of post-conflict peace-building, to consider granting, and effectively implementing, amnesties and restitution of rights, in law and practice, for those who have refused to undertake military service on grounds of conscientious objection" (para. 4).

Principle No. 7

Jurisdiction of military tribunals to try minors under the age of 18

Strict respect for the guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile

Justice (Beijing Rules) should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons.11 In no case, therefore, should minors be placed under the jurisdiction of military courts.

26. Articles 40 and 37 (d) of the Convention on the Rights of the Child list the specific safeguards applicable to minors under 18 on the basis of their age, in addition to the safeguards under ordinary law that have already been mentioned. These provisions allow for the ordinary courts to be bypassed in favour of institutions or procedures better suited to the protection of children. A fortiori these protective arrangements rule out the jurisdiction of military courts in the case of persons who are minors.

27. Young volunteers represent a borderline case, given that article 38, paragraph 3, of the Convention allows the recruitment of minors aged between 15 and 18 if States have not ratified the Optional Protocol on the involvement of children in armed conflicts. In the event of armed conflict, article 38 provides that the principles of international humanitarian law should apply. In this regard, special attention should be paid to the situation of child soldiers in the case of war crimes or large-scale violations of human rights.

28. Only civilian courts would appear to be well placed to take into account all the requirements of the proper administration of justice in such circumstances, in keeping with the purposes of the Convention. The Committee on the Rights of the Child has adopted a very clear position of principle when making its concluding observations on country reports.

Principle No. 8

Functional authority of military courts

The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.

29. The jurisdiction of military tribunals to try military personnel or personnel treated as military personnel should not constitute a derogation in principle from ordinary law, corresponding to a jurisdictional privilege or a form of justice by one's peers. Such jurisdiction should remain exceptional and apply only to the requirements of military service. This concept constitutes the "nexus" of military justice, particularly as regards field operations, when the territorial court cannot exercise its jurisdiction. Only such a functional necessity can justify the limited but irreducible existence of military justice. The national court is prevented from exercising its active or passive jurisdiction for practical reasons arising from the remoteness of the action, while the local court that would be territorially competent is confronted with jurisdictional immunities.

30. The distinction between combatants and non-combatants and the protection of civilian persons in time of war both require special attention in the light of the 1949 Geneva Conventions
and their two Additional Protocols of 1977 (cf. supra).

31. Similarly, thought needs to be given to the situation of military and assimilated personnel, including civilian police taking part in peacekeeping operations and paramilitaries or private contractors taking part in international occupation arrangements.

Principle No. 9

Trial of persons accused of serious human rights violations

In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.

32. Contrary to the functional concept of the jurisdiction of military tribunals, there is today a growing tendency to consider that persons accused of serious human rights violations cannot be
tried by military tribunals insofar as such acts would, by their very nature, not fall within the scope of the duties performed by such persons. Moreover, the military authorities might be tempted to cover up such cases by questioning the appropriateness of prosecutions, tending to file cases with no action taken or manipulating "guilty pleas" to victims' detriment. Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity. The authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings.

33. This was the solution favoured by the General Assembly when it adopted the Declaration on the Protection of All Persons from Enforced Disappearances, which stipulates that persons
presumed responsible for such crimes "shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts".12 The constituent
parts of the crime of enforced disappearance cannot be considered to have been committed in the performance of military duties. The Working Group on Enforced or Involuntary Disappearances mentioned this principle in its most recent report, referring to the need to have recourse to a "competent civilian court".13 The 1994 Inter-American Convention on Forced Disappearance of Persons establishes the same principle in article IX. It is noteworthy, however, that the draft international convention on the protection of all persons from enforced disappearance avoids the question, stipulating only in article 11, paragraph 3, that "any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law"14

34. The scope of the principle has been extended in the updated Set of principles for the promotion and protection of human rights through action to combat impunity: "The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations,

which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court."15

35. Above all, it must be observed that the doctrine and jurisprudence of the Human Rights Committee, the Committee against Torture, the Committee on the Rights of the Child, the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights and the country-specific and thematic procedures of the United Nations Commission on Human Rights, are unanimous: military tribunals are not competent to try military personnel responsible for serious human rights violations against civilians.16

Principle No. 10

Limitations on military secrecy

The rules that make it possible to invoke the secrecy of military information should not be diverted from their original purpose in order to obstruct the course of justice or to violate human rights. Military secrecy may be invoked, under the supervision of independent monitoring bodies, when it is strictly necessary to protect information concerning national defence. Military secrecy may not be invoked:

(a) Where measures involving deprivation of liberty are concerned, which should not, under any circumstances, be kept secret, whether this involves the identity or the whereabouts of persons deprived of their liberty;
(b) In order to obstruct the initiation or conduct of inquiries, proceedings or trials, whether they are of a criminal or a disciplinary nature, or to ignore them;
(c) To deny judges and authorities delegated by law to exercise judicial activities access to documents and areas classified or restricted for reasons of national security;
(d) To obstruct the publication of court sentences;
(e) To obstruct the effective exercise of habeas corpus and other similar judicial remedies.

36. The invocation of military secrecy should not lead to the holding incommunicado of a person who is the subject of judicial proceedings, or who has already been sentenced or subjected to any degree of deprivation of liberty. The Human Rights Committee, in its general comment No. 29 concerning states of emergency (article 4 of the Covenant), considered that "States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages [...], through arbitrary deprivations of liberty [...]" (para. 11), and "the prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law" (para. 13).

37. In its general comment No. 20, the Human Rights Committee stressed that "to guarantee the effective protection of detained persons, provisions should be made for detainees to be held
in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be

kept in registers readily available and accessible to those concerned, including relatives and friends". The Committee adds that "provisions should also be made against incommunicado detention" (para. 11).

38. In times of crisis, humanitarian law provides for the possibility of communication with the outside world, in accordance with section V of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949. The European Court of Human Rights has described the situation of families lacking information on the fate of their near and dear ones as "inhuman treatment" within the meaning of article 3 of the European Convention on Human Rights, in Cyprus v. Turkey, 2001.17 The Human Rights Committee and the Inter-American Court of Human Rights and Inter-American Commission on Human Rights have followed the same approach. It is important to recall that article 32 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) posits, as a general principle concerning missing and dead persons, "the right of families to know the fate of their relatives".

39. It should also be stressed that persons deprived of their liberty should be held in official places of detention and the authorities should keep a register of detained persons.18 As far as
communication between persons deprived of their liberty and their lawyers is concerned, it should be recalled that the Basic Principles on the Role of Lawyers stipulate that "all arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or
censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials".19

Principle No. 11

Military prison regime

Military prisons must comply with international standards, including the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and must be accessible to domestic and international inspection bodies.

40. Military prisons must comply with international standards in ordinary law, subject to effective supervision by domestic and international inspection bodies. In the same way that military justice must conform to the principles of the proper administration of justice, military prisons must not depart from international standards for the protection of individuals subject to detention or imprisonment. In keeping with the preceding principles and pursuant to the principle of "separation of categories" cited in the Standard Minimum Rules for the Treatment of Prisoners, it should not be possible for a civilian to be held in a military prison. This applies to disciplinary blocks as well as military prisons or other internment camps under military supervision, and to all prisoners, whether in pretrial detention or serving sentence after conviction for a military offence.

41. In this regard, States should be encouraged to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible. Article 4, paragraph 2 of the Protocol stipulates that "deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority".

Principle No. 12

Guarantee of habeas corpus

In all circumstances, anyone who is deprived of his or her liberty shall be entitled to take proceedings, such as habeas corpus proceedings, before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The right to petition for a writ of habeas corpus or other remedy should be considered as a personal right, the guarantee of which should, in all circumstances, fall within the exclusive jurisdiction of the ordinary courts. In all circumstances, the judge must be able to have access to any place where the detainee may be held.

42. The right of access to justice - the "right to the law" - is one of the foundations of the rule of law. In the words of article 9, paragraph 4, of the International Covenant on Civil and Political Rights: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." In wartime, the guarantees under humanitarian law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, apply in full.

43. Habeas corpus is also related to article 2, paragraph 3, of the Covenant. In its general comment No. 29 on states of emergency (article 4 of the Covenant), the Human Rights Committee stated (paras. 14 and 16) that "article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant, to provide a remedy that is effective. [...] The Committee is of the opinion that [these] principles" and the provision relating to effective remedies "require that fundamental requirements of fair trial must be respected during a state of emergency". It follows from the same principle that, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant".

44. The non-derogable nature of habeas corpus is also recognized in a number of declaratory international norms.20 In resolution 1992/35, entitled "Habeas corpus",

the Commission on Human Rights urged States to maintain the right to habeas corpus even during states of emergency. The Inter-American Court of Human Rights considered that judicial remedies for the protection of rights such as habeas corpus are not subject to derogation.21

Principle No. 13

Right to a competent, independent and impartial tribunal

The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy. In no circumstances should military courts be allowed to resort to procedures involving anonymous or "faceless" judges and prosecutors.

45. This fundamental right is set out in article 10 of the Universal Declaration of Human Rights: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 14 of the International Covenant on Civil and Political Rights, like the regional conventions, provides details of its practical scope. Regarding the concept of an independent and impartial tribunal, a large body of case law has spelled out the subjective as well as the objective content of independence and impartiality. Particular emphasis has been placed on the English adage that "justice should not only be done but should be seen to be done". It is also important to emphasize that the Human Rights Committee has stated that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".22

46. The statutory independence of judges vis-à-vis the military hierarchy must be strictly protected, avoiding any direct or indirect subordination, whether in the organization and operation of the system of justice itself or in terms of career development for military judges. The concept of impartiality is still more complex in the light of the above-mentioned English adage, as the parties have good reason to view the military judge as an officer who is capable of being "judge in his own cause" in any case involving the armed forces as an institution, rather than a specialist judge on the same footing as any other. The presence of civilian judges in the composition of military tribunals can only reinforce the impartiality of such tribunals.

47. Emphasis should also be placed on the requirement that judges called on to sit in military courts should be competent, having undergone the same legal training as that required of professional judges. The legal competence and ethical standards of military judges, as judges who are fully aware of their duties and responsibilities, form an intrinsic part of their independence and impartiality.

48. The system of anonymous or "faceless" military judges and prosecutors has been heavily criticized by the Human Rights Committee, the Committee against Torture, the Special Rapporteur on the independence of judges and lawyers, and others. The

Human Rights Committee has ruled that in a system of trial by "faceless judges", neither the independence nor the impartiality of the judges is guaranteed, and such a system also fails to safeguard the presumption of innocence.23

Principle No. 14

Public nature of hearings

As in matters of ordinary law, public hearings must be the rule, and the holding of sessions in camera should be altogether exceptional and be authorized by a specific, well-grounded decision the legality of which is subject to review.

49. The instruments referred to above state that "everyone shall be entitled to a fair and public hearing". Public hearings are one of the fundamental elements of a fair trial. The only restrictions on this principle are those laid down in ordinary law, in keeping with article 14, paragraph 1, of the International Covenant on Civil and Political Rights: "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice ... ." All these grounds must be strictly interpreted, particularly when "national security" is invoked, and must be applied only where necessary in "a democratic society".

50. The Covenant also states that "any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires ...". This is not the case, at least in principle, where proceedings in military courts are concerned. Here, too, a statement of the grounds for a court ruling is a condition sine qua non for any possibility of a remedy and any effective supervision.

Principle No. 15

Guarantee of the rights of the defence and the right to a just and fair trial

The exercise of the rights of the defence must be fully guaranteed in military courts under all circumstances. All judicial proceedings in military courts must offer the following guarantees:
(a) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law;
(b) Every accused person must be informed promptly of the details of the offence with which he or she is charged and, before and during the trial, must be guaranteed all the rights and facilities necessary for his or her defence;
(c) No one shall be punished for an offence except on the basis of individual criminal responsibility;
(d) Everyone charged with a criminal offence shall have the right to be tried without undue delay and in his or her presence;
(e) Everyone charged with a criminal offence shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal

assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
(f) No one may be compelled to testify against himself or herself or to confess guilt;
(g) Everyone charged with a criminal offence shall have the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
(h) No statement or item of evidence which is established to have been obtained through torture, cruel, inhuman or degrading treatment or other serious violations of human rights or by illicit means may be invoked as evidence in the proceedings;
(i) No one may be convicted of a crime on the strength of anonymous testimony or secret evidence;
(j) Everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law;
(k) Every person found guilty shall be informed, at the time of conviction, of his or her rights to judicial and other remedies and of the time limits for the exercise of those rights.

51. In paragraph 4 of its general comment No. 13, the Human Rights Committee stated that "the provisions of article 14 [of the International Covenant on Civil and Political Rights] apply to
all courts and tribunals within the scope of that article whether ordinary or specialized". In its jurisprudence and in its general comment No. 29, the Committee considered that a number of
procedural rights and judicial guarantees set out in article 14 of the Covenant are not subject to derogation. At its eightieth session, in 2004, the Committee decided to draft a new general
comment on article 14 of the Covenant, particularly with a view to updating general comment No. 13.

52. International humanitarian law establishes minimum guarantees in judicial matters.24 Article 75, paragraph 4, of Protocol I to the Geneva Conventions reiterates the judicial guarantees set out in article 14, paragraphs 2 and 3, of the Covenant and those mentioned in article 15 of the Covenant. This article is not subject to derogation by virtue of article 4, paragraph 2, of the Covenant. It should be emphasized that, in paragraph 16 of its general comment No. 29, the Human Rights Committee stated that "as certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations".

53. The provision of legal assistance by military lawyers, particularly when they are officially appointed, has been challenged as inconsistent with respect for the rights of the defence. Simply in the light of the adage that "justice should not only be done but should be seen to be done", the presence of military lawyers damages the credibility of these jurisdictions. Yet experience shows that the trend towards the strict independence of military lawyers - if it proves to be genuine despite the fundamental ambiguity in the title - helps to guarantee to accused persons an effective defence that is adapted to the functional constraints involved in military justice, particularly when it is applied extraterritorially. Nevertheless, the principle of free choice of defence

counsel should be maintained, and accused persons should be able to call on lawyers of their own choosing if they do not wish to avail themselves of the assistance of a military lawyer. For this reason, rather than advocating the simple abolition of the post of military lawyer, it seemed preferable to note the current trend, subject to two conditions: that the principle of free choice of defence counsel by the accused is safeguarded, and that the strict independence of the military lawyer is guaranteed.

Principle No. 16

Access of victims to proceedings

Without prejudice to the principles relating to the jurisdiction of military courts, such courts should not exclude the victims of crimes or their successors from judicial proceedings, including inquiries. The judicial proceedings of military courts should ensure that the rights of the victims of crimes - or their successors - are effectively respected, by guaranteeing that they:
(a) Have the right to report criminal acts and bring an action in the military courts so that judicial proceedings can be initiated;
(b) Have a broad right to intervene in judicial proceedings and are able to participate in such proceedings as a party to the case, e.g. a claimant for criminal indemnification, an amicus curiae or a party bringing a private action;
(c) Have access to judicial remedies to challenge decisions and rulings by military courts against their rights and interests;
(d) Are protected against any ill-treatment and any act of intimidation or reprisal that might arise from the complaint or from their participation in the judicial proceedings.

54. All too often, victims are still excluded from investigations when a military court has jurisdiction; this makes it easy to file cases without taking action on grounds of expediency, or to make deals or come to amicable arrangements that flout victims' rights and interests. Such blatant inequality before the law should be abolished or, pending this, strictly limited. The presence of the victim or his or her successors should be obligatory, or the victim should be represented whenever he or she so requests, at all stages of the investigation and at the reading of the judgement, with prior access to all the evidence in the file.

Principle No. 17

Recourse procedures in the ordinary courts

In all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts. In all situations, disputes concerning legality should be settled by the highest civil court. Conflicts of authority and jurisdiction between military tribunals and ordinary courts must be resolved by a higher judicial body, such as a supreme court or constitutional court, that forms part of the system of ordinary courts and is composed of independent, impartial and competent judges.

55. In resolution 2005/30, "Integrity of the judicial system", the Commission on Human Rights highlighted this issue with a reference to "procedures that are recognized according to international law as guarantees of a fair trial, including the

right to appeal a conviction and a sentence" (para. 8).

56. While the residual maintenance of first-degree military courts may be justified by their functional authority, there would seem to be no justification for the existence of a parallel hierarchy of military tribunals separate from ordinary law. Indeed, the requirements of proper administration of justice by military courts dictate that remedies, especially those involving challenges to legality, are heard in civil courts. In this way, at the appeal stage or, at the very least, the cassation stage, military tribunals would form "an integral part of the general judicial system". Such recourse procedures should be available to the accused and the victims; this presupposes that victims are allowed to participate in the proceedings, particularly during the trial stage.

57. Similarly, an impartial judicial mechanism for resolving conflicts of jurisdiction or authority should be established. This principle is vital, because it guarantees that military tribunals do not constitute a parallel system of justice outside the control of the judicial authorities. It is interesting to note that this was recommended by the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions.25

Principle No. 18

Due obedience and responsibility of the superior

Without prejudice to the principles relating to the jurisdiction of military tribunals:
(a) Due obedience may not be invoked to relieve a member of the military of the individual criminal responsibility that he or she incurs as a result of the commission of serious violations of human rights, such as extrajudicial executions, enforced disappearances and torture, war crimes or crimes against humanity;
(b) The fact that a serious violation of human rights, such as an extrajudicial execution, an enforced disappearance, torture, a war crime or a crime against humanity has been committed by a subordinate does not relieve his or her superiors of criminal responsibility if they failed to exercise the powers vested in them to prevent or halt their commission, if they were in possession of information that enabled them to know that the crime was being or was about to be committed.

58. The principle of due obedience, often invoked in courts and tribunals, particularly military tribunals, should, in the framework of this review, be subject to the following limitations: the fact that the person allegedly responsible for a violation acted on the order of a superior should not relieve him or her of criminal responsibility. At most, this circumstance could be considered as grounds not for "extenuating circumstances" but for a reduced sentence.

Conversely, violations committed by a subordinate do not relieve his or her hierarchical superiors of their criminal responsibility if they knew or had reason to know that their subordinate was committing, or was about to commit, such violations, and they did not take the action within their power to prevent such violations or restrain their perpetrator.

59. It is important to emphasize that, where criminal proceedings and criminal

responsibility are concerned, the order given by a hierarchical superior or a public authority cannot be invoked
to justify extrajudicial executions, enforced disappearances, torture, war crimes or crimes against humanity, nor to relieve the perpetrators of their individual criminal responsibility. This
principle is set out in many international instruments.

60. International law establishes the rule that the hierarchical superior bears criminal responsibility for serious violations of human rights, war crimes and crimes against humanity committed by personnel under his or her effective authority and/or control. The principle of the criminal responsibility of the negligent commanding officer is recognized in many international instruments, international case law and the legislation of a number of countries.

Principle No. 19

Non-imposition of the death penalty

Codes of military justice should reflect the international trend towards the gradual abolition of the death penalty, in both peacetime and wartime. In no circumstances shall the death penalty be imposed or carried out:
(a) For offences committed by persons aged under 18;
(b) On pregnant women or mothers with young children;
(c) On persons suffering from any mental or intellectual disabilities.

61. The trend towards the gradual abolition of capital punishment, including in cases of international crimes, should be extended to military justice, which provides fewer guarantees than the ordinary courts since, owing to the nature of the sentence, judicial error in this instance is irreversible.

62. Although the death penalty is not prohibited under international law, international human rights instruments clearly lean towards abolition.26 In particular, the application of the death penalty to vulnerable persons, particularly minors, should be avoided in all circumstances, in keeping with article 6, paragraph 5, of the International Covenant on Civil and Political Rights,
which provides that "sentence of death shall not be imposed for crimes committed by persons below 18 years of age ... ". Imposition of the death penalty on pregnant women, mothers with
young children and people with mental or intellectual disabilities is also prohibited, as stated in Commission resolution 2005/59 on the question of the death penalty (para. 7 (a), (b) and (c)).

63. In the same resolution, the Commission "urges all States that still maintain the death penalty ... to ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights" (para. 7 (e)). Sub-Commission resolution 2004/25 recommends that the death penalty should not be imposed on civilians tried by military tribunals or by courts in which one or more of the judges is a member of the armed forces. The same should apply to conscientious objectors on trial for

desertion before military tribunals.

Principle No. 20

Review of codes of military justice

Codes of military justice should be subject to periodic systematic review, conducted in an independent and transparent manner, so as to ensure that the authority of military tribunals corresponds to strict functional necessity, without encroaching on the jurisdiction that can and should belong to ordinary civil courts.

64. Since the sole justification for the existence of military tribunals has to do with practical eventualities, such as those related to peacekeeping operations or extraterritorial situations, there is a need to check periodically whether this functional requirement still prevails.

65. Each such review of codes of military justice should be carried out by an independent body, which should recommend legislative reforms designed to limit any unjustified residual
authority and thus return, to the greatest extent possible, to the jurisdiction of the civil courts under ordinary law, while seeking to avoid double jeopardy.

66. More generally, this periodic review should ensure that military justice is appropriate and effective in relation to its practical justification. It would also embody the fully democratic nature of an institution that must be accountable for its operations to the authorities and all citizens. In this way, the fundamental discussion concerning the existence of military justice as such can be conducted in a completely transparent way in a democratic society.

Notes

1 E/CN.4/Sub.2/1994/24, annexe II, principes 17 et 19.

2 Observation générale no 29, par. 16. Voir aussi l'affaire Miguel González del Río c. Pérou, communication no 263/1987, décision du 20 novembre 1992, CCPR/C/46/D/263/1987
du 28 octobre 1992, par. 5.2.

3 CICR, Commentaires du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux, par. 3084. Voir
aussi CICR, Customary International Humanitarian Law, vol. I, Rules (sous la direction de J.-M. Henckaerts et L. Diswald-Beck) règle 100, Cambridge University Press, 2005, p. 356.

4 CICR, Commentaires du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux, par. 4601.

5 CICR, Customary International Humanitarian Law, vol. I, Rules (sous la direction de J.-M. Henckaerts et L. Doswald-Beck), règle 100, Cambridge University Press, 2005, p. 356.

6 Voir les nombreux exemples cités par Federico Andreu-Guzman, Military jurisdiction and international law, Military courts and civilians, vol. II, Commission internationale de juristes. (À paraître.)

7 Assemblée générale, résolution 33/165 du 20 décembre 1978; Commission des droits de l'homme, résolutions 38 (XXXVI) de 1980, 1987/46 de 1987, 1989/59 de 1989, 1993/84 de 1993, 1995/83 de 1995 et 1998/77 de 1998; Comité des droits de l'homme, observation générale no 22 (1993); décisions du Comité des droits de l'homme relatives aux communications nos 446/1991 (par. 4.2), 483/1991 (par. 4.2) et 402/1990 (affaire Henricus Antonius Godefriedus Maria Brink of c. Pays-Bas).

8 Observation générale no 22 (1993).

9 Observations finales du Comité des droits de l'homme: Arménie, 19 novembre 1998, CCPR/C/79/Add.100, par. 18, et observations finales du Comité des droits de l'homme: Israël, 21 août 2003, CCPR/CO/78/ISR, par. 24.

10 Observations finales du Comité des droits de l'homme: France, 4 août 1997, CCPR/C/79/Add.80, par. 19, et observations finales du Comité des droits de l'homme: Espagne, 3 avril 1996, CCPR/C/79/Add.61, par. 15.

11 Adopté par l'Assemblée générale dans sa résolution 40/33 du 29 novembre 1985.

12 Résolution 47/133 de l'Assemblée générale du 18 décembre 1992, art. 16, par. 2.

13 E/CN.4/2005/65, par. 375.

14 E/CN.4/2006/57, annexe I.

15 E/CN.4/2005/102/Add.1, principe 29: Restrictions à la compétence des tribunaux militaires. Voir aussi la résolution 2005/81 du 21 avril 2005.

16 Voir les nombreux exemples cités par Federico Andreu-Guzman, Military jurisdiction and international law, Military courts and gross human rights violations, vol. I, Commission internationale de juristes, Genève, 2004. Voir aussi Commission africaine des droits de l'homme et des peuples, Principles and guidelines on the right to a fair trial and legal assistance in
Africa, DOC/OS/(XXX)247, 2003.

17 Cour européenne des droits de l'homme, arrêt du 10 mai 2001, par. 156 à 158.

18 Déclaration sur la protection de toutes les personnes contre les disparitions forcées, art. 10 (par. 1); Ensemble de règles minima pour le traitement des détenus, règle 7; Ensemble de
principes pour la protection de toutes les personnes soumises à une forme quelconque de détention ou d'emprisonnement, principes 20 et 29; Règles pénitentiaires

européennes, règles 7
et 8.

19 Principe 8 des Principes de base relatifs au rôle du barreau, adoptés par le huitième Congrès des Nations Unies pour la prévention du crime et le traitement des délinquants qui s'est tenu à La Havane (Cuba) du 27 août au 7 septembre 1990.

20 Ensemble de principes pour la protection de toutes les personnes soumises à une forme quelconque de détention ou d'emprisonnement, principe 32, et Déclaration sur la protection
de toutes les personnes contre les disparitions forcées, art. 9.

21 Avis consultatifs OC-8/87, «L'habeas corpus dans les situations d'urgence», du 30 janvier 1987 et OC-9/87, «Garanties judiciaires dans les états d'urgence», du 6 octobre 1987.

22 Affaire Miguel González del Río c. Pérou, communication no 263/1987, décision du 20 novembre 1992, CCPR/C/46/D/263/1987 du 28 octobre 1992, par. 5.2

23 Affaire Víctor Alfredo Polay Campos c. Pérou, communication no 577/1994, décision du 6 novembre 1997, CCPR/C/61/D/577/1994 du 9 janvier 1998, par. 8.8

24 Voir, notamment, le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), art. 75, par. 4, et le Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II), art. 6.

25 Rapport conjoint du Rapporteur spécial sur la question de la torture, Nigel Rodley, et du Rapporteur spécial sur les exécutions extrajudiciaires, sommaires ou arbitraires, Bacre Waly
Ndiaye: visite des Rapporteurs spéciaux en Colombie (17-26 octobre 1994), E/CN.4/1995/111, par. 120.

26 Voir, notamment, l'article 6 (par. 2 et 6) du Pacte international relatif aux droits civils et politiques, l'article 4 (par. 2) de la Convention américaine relative aux droits de l'homme, l'article premier des Garanties pour la protection des droits des personnes passibles de la peine de mort, l'observation générale du Comité des droits de l'homme no 6 (par. 6).
